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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No._____

THOMAS A. BAREFOOT,
PETITIONER

-V.-

THE STATE OF TEXAS,
RESPONDENT

==========

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

==========

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NO.

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THOMAS A. BAREFOOT
Petitioner

VS.

THE STATE OF TEXAS
Respondent

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PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS OF TEXAS

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Texas, entered on March 12, 1980, rehearing denied on April 30, 1980.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at --S.W.2d--, No. 637159, dated March 12, 1980, and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1237(3), petitioner having asserted below and asserts here the deprivation of rights secured by the Constitution of the United States.

The judgment of the Court of Criminal Appeals of Texas was rendered on March 12, 1980, and petitioner's motion for leave to file a motion for rehearing was denied on April 30, 1980.

On July 29, 1980, Mr. Justice Powell entered an order staying petitioner's scheduled execution, [A-100, and granted an extension of time to and including August 28, 1980, in which to file a petition for writ of certiorari [A-99].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. It also involves the following provisions of Texas law:

TEXAS CODE OF CRIMINAL PROCEDURE, ARTICLE 37.071.

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the Court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

TEXAS PENAL CODE, SEC. 19.02(a)(1). MURDER.

(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual.

TEXAS PENAL CODE, SEC. 19.03(a)(1) CAPITAL MURDER

(a) A person commits an offense if he commits murder as defined under Section 19.01(a)(1) of this Code and:

(1) the person murders a peace officer . . . who is acting in the lawful discharge of an official duty, and who the person knows is a peace officer . . .

QUESTIONS PRESENTED

I

WHETHER THE STATE'S USE OF PSYCHIATRIC TESTIMONY BASED SOLELY UPON A HYPOTHETICAL QUESTION WHICH CONTAINED A DETAILED SUMMMARY OF THE STATE'S AGGRAVATING EVIDENCE AT BOTH STAGES OF THE TRIAL AND NONE OF THE MITIGATING CIRCUMSTANCES, DISTORTED THE SENTENCING FACTFINDING PROCESS AND BOLSTERED THE STATE'S PUNISHMENT EVIDENCE WITH THE GLOSS OF MEDICAL EXPERTISE, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

II

WHETHER PSYCHIATRIC TESTIMONY THAT PETITIONER WOULD CONSTITUTE A CONTINUING DANGER TO SOCIETY, BASED SOLELY UPON A HYPOTHETICAL QUESTION WHICH CONTAINED ONLY THE AGGRAVATING EVIDENCE PRODUCED BY THE STATE AT BOTH STAGES OF THE TRIAL, AND ALREADY HEARD BY THE JURY, IS OF SUFFICIENT RELIABILITY TO SUPPORT A SENTENCE OF DEATH, UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

III

WHETHER THE STATE'S USE OF PSYCHIATRIC TESTIMONY BASED SOLELY UPON A HYPOTHETICAL QUESTION WHICH CONTAINED A DETAILED SUMMARY OF THE STATE'S AGGRAVATING EVIDENCE AT BOTH STAGES OF THE TRIAL BUT WHICH CONTAINED NO MEDICAL, PSYCHIATRIC OR PSYCHOLOGICAL FACTS OR HISTORY, AND NO TECHNICAL MATERIAL WHATSOEVER PECULIARLY WITHIN THE EXPERTISE OF A PSYCHIATRIC OR MEDICAL WITNESS, WAS SO UNRELIABLE AS TO DEPRIVE THE PETITIONER OF DUE PROCESS OF LAW, SUBJECTING HIM TO CRUEL AND UNUSUAL PUNISHMENT.

STATEMENT OF THE CASE

Petitioner Thomas A. Barefoot was convicted and sentenced to death for the shooting of Carl Levin, a patrolman for the City of Harker Heights, Texas, on August 7, 1978.

At the outset of its case on guilt or innocence, the state presented the testimony of six witnesses from New Mexico, regarding petitioner's arrest in Valencia County, New Mexico, on October 29, 1977, for the offenses of criminal sexual penetration of a minor in the first degree and kidnapping, and his escape from the Valencia County jail on January 19, 1978. (R.1113-1142)

On the morning of August 7, 1978, PFC Edwards was driving to Fort Hood when he saw flames coming from the roof of the Silver Spur Club. (R.1168-1170) He saw a man near the edge of the Club parking lot who was looking in the direction of the fire. This man ran across the highway. (R.1170-1174)

Edwards reported the fire and the presence of the man to the Harker Heights police dispatcher. As he was returning to the fire, Edwards again saw the same man. He reported this to officers Carl Levin and Chuck Cox who were at the fire when he got back. He observed what looked like a burning plastic milk jug on the roof of the club. (R.1182-1193)

Levin, dressed in a Harker Heights police uniform departed in a marked Harker Heights police car. (R.1194-1195)

Edwards identified the petitioner as the man he saw at the scene of the fire on August 7, 1978. (R.1203, 1215-1216)

Michael Thrash, another Fort Hood soldier, was walking to work at 5:35 a.m. on August 7th, when he saw a car with emergency flashers and a spotlight parked at an intersection. (R.1219-1231) Thrash saw a man walk from the bushes and up to the police car. (Sf.1228-1231) This man had a conversation with a police officer and then the man took a step forward. There was a shot and Thrash saw fire come from the barrel of a gun. (R.1241) The policeman fell to the ground and the man ran away. Thrash obtained assistance after attempting to chase the man who fired the shot.

(R.1243-1244) He could not identify the man who did the shooting.

Donnie Ray Tiller, a cab driver who lived in a trailer with Robert Roberson, Radene Goodlow and Deborah Forbes, in Killeen, Texas, testified that the petitioner, known to the witness as "Darren Callier," began living in the trailer in June, 1978. (R.1396-1404, 1407-1409).

On August 6th, the petitioner told Tiller of a plan to burn or blow up a building to create a diversion while he was robbing the Oasis Club. (R.1415-1418) The last time Tiller saw petitioner was about 4:30 p.m. on August 6th. (R.1419-1422)

The following morning petitioner called Tiller at work and asked him if he had been listening to the news. When Tiller said that he had, petitioner stated: "Yeah, I shot him. I killed the mother fucker, I shot him in the head. . ." (R.1423-1429)

Another habitue of the trailer, Robert Roberson, testified that at about 4:30 a.m. on August 7th, he drove petitioner to Harker Heights. Petitioner had what appeared to be a small automatic pistol, a home-made bomb and a plastic milk jug. Petitioner said he was going to blow up the Silver Spur Club because Joe told him to do it for the insurance.(R.1516-1521,1527,1576-1577) Roberson drove petitioner to a convenience store where petitioner bought gas, then he left petitioner at another convenience store in Harker Heights and returned to the trailer. Petitioner left the bomb in the car and Roberson disposed of it that afternoon. (R.1539,1575)

Later that morning Roberson was awakened by petitioner who had red splotches on his t-shirt and face. Petitioner said he had "wasted a cop." He changed clothes and left the trailer on foot. (R.1532-1538, 1581-1582)

That same morning Francisco Hernandez met petitioner on a street in Killeen and after a brief conversation they went to a grocery store where petitioner bought groceries and then to Hernandez's apartment, where petitioner spent the night. (R.1601-1605, 1629-1630)

Hernandez heard a news broadcast on the morning of August 8th which indicated that the police were looking for petitioner.

Petitioner admitted that he was the man they were looking for but he denied that he killed a policeman. (R.1606-1614)

Petitioner shaved his mustache and Hernandez gave him a different shirt. Hernandez obtained a ride for them to Belton where petitioner bought a bus ticket to Houston and Hernandez hitch-hiked to Austin. (R.1615-1624, 1635-1637)

EVIDENCE AT THE PUNISHMENT HEARING

John E. Green, first assistant United States Attorney for the Western District of Oklahoma, in Oklahoma City, handled a case on October 22, 1975, in which petitioner was convicted of the unlawful possession of a sawed-off .410 gauge shotgun, and sentenced to confinement in the federal penitentiary for one year. Petitioner objection to this evidence, because it did not involve an act of violence, was overruled. (R.1663-1666)

Byron Legendre first assistant district attorney for the Fifteenth Judicial District Court in Lafayette Parish, Louisiana, was the prosecutor in a case where petitioner entered a plea of guilty to two felony counts, distribution of marijuana and possession of amphetamine, on December 2, 1974. (R.1968-1970)

Legendre was present in court on November 26, 1974, when petitioner pled guilty to the misdemeanor offense of possessing marijuana and the offense of carrying a concealed weapon.(R.1669-1670)

John Clausen, now a deputy sheriff, was a police officer in Morgan City, Louisiana, in 1969. At that time he knew the general reputation of the petitioner for being a peaceful and law abiding citizen in Morgan City. That reputation was bad. (R.1975-1976)

Louis Belaire had been a deputy sheriff in New Iberia, Louisiana, in 1972. At that time, in Iberia Parish, petitioner's reputation for being a peaceful and law abiding citizen was bad. (R.1978-1979)

Lieutenant Danny Brown of the Louisiana State Police stationed in Lafayette, Louisiana, asserted that petitioner's reputation was bad in that area in 1973. (R.1980-1983)

Carl Primeaux, probation parole officer for the Louisiana Department of Corrections, broadened the area of petitioner's

bad reputation to include both Lafayette and New Iberia, Louisiana, during 1973 to 1975. (R.1984-1986)

Chester Childs, a police officer from Oklahoma City, Oklahoma, testified that petitioner's reputation for being a peaceful and law abiding citizen in Oklahoma City in 1975 was bad. (R.1988-1991)

Dorece Green, Executive Director of Permian Place, established the same reputation for petitioner in Ector County, Texas, in 1976. (R.1991-1994)

Sheriff A. C. Gaston, from Woodward, Oklahoma, gave identical reputation testimony for the year 1977. (R.1995-1997)

Bob Olive, assistant chief of police in Neodesha, Kansas, gave like answers for petitioner's reputation in his area in 1977. (R.2001-2004)

Thomas Esquibel, district attorney for Sandeval and Valencia Counties, New Mexico, testified that petitioner's reputation in those counties was bad in 1977 and 1978. (R.2004-2007).

James Trost, a clinical psychologist for the New Mexico Health and Environmental Department, in Santa Fe, New Mexico, was in Valencia County on December 6, 1977, in response to a court order to conduct an evaluation. He had "some familiarity" with petitioner's reputation for being a peaceful and law abiding citizen and that reputation was bad. (R.2008-2009)

THE PSYCHIATRIC TESTIMONY

Doctor John Holbrook was "self employed" the major part of his practice being in the area of forensic psychiatry. His office was in Dallas, Texas. He listed an impressive array of qualifications. (R.2066-2069) He was employed by the Texas Department of Corrections from 1968 until 1973, primarily to "reinforce through a long correctional experience some of [his] experiences [he] had prior to that time in doing criminal evaluations." (R.2069)

According to Holbrook he had been called to testify as an expert witness for both the state and the defense in death penalty cases. (R.2070)

Holbrook thought it was within his capacity as a doctor of psychiatry to predict the future dangerousness of an individual within a reasonable medical certainty if he was supplied with enough background data about that individual. (R.2072) He could do this even if he had never seen the individual or never performed an actual face to face evaluation process with him. (R.2073)

Holbrook did not know petitioner. He had never talked to him. Even so, he was prepared to answer and did answer the following hypothetical question posed by the prosecutor: (R.2074-2091)

"Doctor Holbrook, we'll first start out with an individual that is approximately [33] years of age and we'll go back in time to the year [1969] when that individual was approximately [24] years of age. Starting at that point in time, Doctor, I'll ask you if you will assume please that during the year of [1969] the individual that we're talking about had acquired a bad reputation for the character trait of being peaceful and had also acquired the bad reputation for the character trait of being law abiding in the community surrounding Morgan City, Louisiana. I'll then ask you to assume that some three years later in the year of [1972], that same individual in the community surrounding New Iberia, Louisiana, had once again acquired a bad reputation in the community for being peaceful and a bad reputation in the community for being law abiding. Doctor Holbrook, I would ask you further that in the year [1973] to next year, still within the state of Louisiana, in the community of Lafayette, Louisiana, the same individual has once again acquired a bad reputation in the community for being peaceful and a bad reputation in the community for being law abiding. I'll further ask you to assume that in the year [1974], the next year, that this same individual was convicted of a felony offense of distribution of marijuana and was sentenced to five years in prison at hard labor probated and one year to do in the Parish jail in Louisiana. I'll further ask you to assume that during the year of [1974] this same individual that we're talking about, was convicted of the felony

offense of possession of amphetamines. . . . I'll further ask you to assume also in the year of [1974] this same individual that we're talking about, was convicted of the offense of unlawfully carrying a weapon. Once again in the year of [1974] I would ask you to assume that that individual was convicted of the offense of possesion of marijuana. Then I'd ask you to go to the year [1975] and I'd ask you to assume in the year of [1975] this same individual had acquired or renewed his bad reputation in the community of New Iberia, Louisiana, and Lafayette, Louisiana for being -- for having a bad reputation for being peaceful and a bad reputation for being law abiding. Then I's ask you to assume that in the year of [1975] in the community of Oklahoma City, Oklahoma, that this same individual had acquired for himself a bad reputation for being peaceful and a bad reputation for being law abiding. Doctor, I'd further ask you if you will please, to assume that during the year of [1975], this same individual was convicted in the Western District Federal Court in the Western District of Oklahoma for the federal felony offense of carrying an unregistered firearm, that being a sawed-off shotgun and was sentenced to do time in the fed al prison. I would further ask you to assume that in the year of [1976] this same individual acquired a bad reputation for being peaceful and a bad reputation for being law abiding in the community of Odessa, Ector County, Texas. I will also ask you then to go to the year of [1977], and I'll ask you to assume that in the year of [1977] in the community of Woodward, Oklahoma, that this same individual had acquired for himself a bad reputation for being peaceful and a bad reputation for being law abiding. I will further ask you to assume that in the same year, that being the year of [1977], this same individual in the community of Neodesha, Kansas, had acquired a bad reputation for being peaceful and a bad reputation for being law abiding. I'll further ask you to assume that in the year of [1977], in the community of Grants, New Mexico and Los Lunas, New Mexico, this same individual had once again acquired a bad reputation for being peaceful and a bad reputation for being law abiding. I'll ask you to assume then also in the

year of [1978], in the community surrounding Valencia County, New Mexico, this individual enjoyed at that time a bad reputation for being peaceful and a bad reputation for being law abiding. I'll further ask you to assume that on January [19, 1978], the same individual was incarcerated in the Valencia County jail awaiting trial for a three count felony indictment. I'll ask you to assume that in an effort to avoid prosecution for those charges, that same individual unlawfully escaped from custody in Valencia County jail and from that day forward became a fugitive from justice. I'll then ask you to go to June of [1978] to thecentral Texas city of Killeen which is located in Bell County, Texas. I'll ask you to assume that this same individual that we're talking about while in the city of Killeen, Bell County, Texas, was located in a public restaurant and while in that public restaurant he met a person that we will call Robert Roberson. And on that first meeting in that public restaurant in the restroom facility he discussed with that individual, Robert Roberson, the sale of methamphetamine or what is called on the street as speed. I would ask you further to assume that possession of methamphetamine or speed in the state of Texas is a second degree felony that carries with it a possible punishment of up to twenty years in the penitentiary and a fine of up to ten thousand dollars. I'll further ask you to assume that delivery or the distribution of methamphetamine is a first degree felony in the state of Texas. That selling it, buying it or being a party to the distribution of methamphetamine being a first degree felony carries with it a possible punishment of life in the Texas Department of Corrections. I'll ask you to assume further that those drug laws did not deter or slow down the individual that we're talking about in his day to day actions. I'll further ask you to assume that the individual that we're talking about then meets a person by the name of Tiller, Donnie Ray Tiller. I'd ask you to assume further that when he meets this individual named Tiller, he then tells Mr. Tiller the following story. He does not tell him that he has come from Valencia County, New Mexico but he tells him that he lives in an adjoining central Texas city by

the name of Copperas Cove, Texas. That he also tells Mr. Tiller that while in the city of Copper (sic) Cove, Texas he borrowed his father's truck and lost it and further he tells Donnie Ray Tiller that his father is fixing to have to go back to college and is going to leave within the next three days and that he then asked Mr. Tiller that if he could stay for the next couple of days with Mr. Tiller at his home in Killeen, Texas, so he can avoid having to answer the consequences of his alleged conduct with his father in Copperas Cove, Texas. I'll ask you to further assume that Mr. Tiller and Mr. Roberson lived together in a trailer park in the city of Killeen, Texas. And I'll ask you to assume further that based on this story that had just been told them by this individual, that they allowed him to stay with them in their trailer for a period of a couple days (sic). I'll further ask you to assume that when this story was told to Mr. Tiller, that the individual that told him that story also told him that his name was Darren Callier and did not tell him what his true name was. I'll ask you to assume further that he then moved into this trailer in Killeen, Texas with Tiller and Roberson and instead of being there for a couple days (sic), he moved in on a permanent status. I'll ask you to assume further that after moving into that trailer he would continually ask Tiller to get him a gun. I'll further ask you to assume that this individual who we'll now call Darren Callier had told Tiller that in his opinion he had been previously mistreated by a Harker Heights police officer. And in response to that he was going to kill a Harker Heights cop. I'll further ask you to assume that after predicting that he would kill a Harker Heights cop, he told Tiller that he, Tiller, would be reading about him, that being Darren Callier, in the newspapers. I'll further ask you to assume that while living in this trailer with Roberson and Tiller, there also lived in that trailer two females, one a prostitute and the other one was living with Robert Roberson. I'll ask you to further assume that all of these individuals, the five of them together, bought, sold, purchased and used speed, that being methamphetamine on a regular basis, even though possession or

sale would carry with it a range of punishment from twenty years all the way to life in the penitentiary. I'd ask you to assume further that during most of the time that this Darren Callier was staying at the trailer, he had no job and no visible means of support. I'll further ask you to assume that this Darren Callier would idly boast on many occasions that he was going to pull off some jobs or robberies and that he would commit the c[illegible]ffense of murder. I'd ask you to assume further that on the date of August [6, 1978] at the trailer in Killeen, Texas Darren Callier specifically told the individual I told you was named Tiller, that he was going to rob a club in Harker Heights, Texas and before robbing the club he was going to set fire to a coffee shop in Harker Heights, Texas as an effort to divert the police from the club that he was then going to rob. I'll then ask you to assume further that on August [6] of [1978], that person, Darren Callier, told Tiller at that time that if he was seen by witnesses he would either then change his appearance so as not to be recognized later or, if necessary, he would kill the witness. I'll then ask you to assume further that on the next day, August [7] of [1978], that individual, Darren Callier, had acquired for himself a gun, a twenty-five caliber automatic and a bomb. I'll ask you to assume further that he then goes to Roberson at the trailer at around [4:30] a.m. in the morning and tells Roberson that he wants him to give him a ride to Harker Heights, Texas because he, Darren Callier, doesn't have a car. He tells Roberson at that time that he is going to blow up the place and rob something. Further that he tells Roberson that he must do this to show everybody that he means what he says and that then he can go on to the next thing. I'll ask you to assume further that he never specifies what the next thing is. I'll then ask you to assume that while at the trailer he takes an empty plastic gallon milk jug and he takes it with him when he goes into the car. That he then talks Roberson into taking him to Harker Heights, Texas. That Roberson then takes him to a gas station in Harker Heights, Texas and that at that time he buys a gallon of gas and puts it into the plastic milk jug that he has. He tells Roberson at this

time that he needs the gallon of gas to ignite the bomb that he's going to blow up -- use to blow up a club in Harker Heights, Texas. I'll ask you to assume further that then at that time Mr. Roberson takes him to a Seven Eleven [convenience store] in Harker Heights, Texas. And at that time the individual by the name of Darren Callier gets out of the car, tells Roberson that he's going to go and blow up a club by the name of the Silver Spur in Harker Heights, Texas and that individual Darren Callier, then leaves the car. I'll ask you to assume further that when he left the car he forgot and left the bomb in the car. I'll then ask you to assume further that this Darren Callier is next seen at the scene of the Silver Spur. I'll ask you to assume that the scene that we're talking about when we (sic) talking about the Silver Spur complex is right around a residential community in Harker Heights, Texas. I'll ask you to assume further that this Darren Callier never made any mention to anybody to show that he had any regard whatsoever to the individuals or the community, the residential community that surrounded this Silver Spur complex and what might happen to them if the fire burned out of control. I'll further then ask you to assume that a fire did, in fact, occur at the Silver Spur complex. They found on top of the building at the Silver Spur complex a heap of melted plastic that appeared to be the same type of melted plastic that you would (sic) in a gallon milk jug. And I'll ask you to assume further that the only individual that was seen then leaving the scene of the fire, that being the arson of the Silver Spur, was this same Darren Callier. I'd ask you to assume that when he was seen by a third party individual there at the scene of the fire that that individual was in a car and got within [7 1/2] yards of Darren Callier at the scene of the fire. I will then further ask you to assume that Darren Callier had ample opportunity to see the individual that had already seen him, the third party that was in the car. I'll then ask you to assume that that individual, that

third party, left the scene of the fire to go en route to the fire department and police department in Harker Heights, Texas. I'll ask you to assume that the last time that individual saw Darren Callier he was running down a street which we will call business [190] and he was going in a westerly direction from the scene of the fire. I will then ask you to assume that an individual who was a police officer by the name of Carl Levin had an occasion to leave his home which was further down business [190] and proceed on to the fire. And I'll ask you to assume further that Carl Levin was in a police car that was obviously marked as a police car as you see in state's exhibit number [29] that I hold up. I would ask you then to assume that this individual that had seen Darren Callier at the fire, went to the police department and left the police department and went back down business [190] in an easterly direction going back towards the fire. I will than ask you to assume that this third party then saw Darren Callier once again on business [190] proceeding in a westerly direction. I'll ask you to assume that another police car similarly marked to the one you see in state's exhibit number [29], was following behind that individual on business [190]. I'll ask you to assume that by the time the police car got to the same location where that third party had seen Darren Callier on [190], he had then disappeared into darkness. I will then ask you to take up this individual Darren Callier where he was next seen and I will ask you to assume that he was next seen at a vacant house around [5:40] in the morning when it was dark. At a vacant house in Harker Heights, Texas at the corner of Amy Lane and Valley Road. I will ask you to assume at that time he was stopped for questioning by a police officer by the name of Carl Levin who was in a car that was distinctively marked as the one you see in state's exhibit number [29] and that Carl Levin was wearing a distinctive Harker Heights police uniform very

similar to the one that you can see over here in state's exhibit number [9]. I will then ask you to assume, if you will, Doctor Holbrook, that Darren Callier then meets the officer as the officer stops his car. I'd ask you to assume that the officer is holding his note pad in his hand. He has a gun strapped to his side but the officer never reaches for the gun. I'll ask you to assume that the officer is standing there talking to Darren Callier and that the officer makes no movement for his gun, no physical movement towards Darren Callier whatsoever. I'd ask you to assume further that at that point in time that without any provocation from the police officer whatsoever, that Darren Callier then reaches in his back pocket, pulls out a [.25] caliber automatic and places it within three to six inches of the head of that police officer and pulls the trigger. I'll then ask you to assume that the direction that he pointed that pistol would have been right to the temple area and I'll ask you to assume that a person's brain would be behind the temple area. I'll ask you to assume that he did not shoot that officer in any other place except the temple area which would house the brain. I'll further ask you to assume that immediately after he shoots the police officer, he then runs from the scene. I'll ask you to assume that he never did anything whatsoever to check on the extent of injuries to that police officer. I'd ask you to assume further that he then runs from the scene into the darkness running down the street and runs down behind people's houses and finally ends up back at the trailer in Killeen, Texas where Roberson and Tiller had lived. I'd ask you to assume that when he gets to the trailer that this Roberson tells him that the police are looking for him. I'll ask you to assume further that he responds, that he knows the police are looking for him. That he had just wasted a cop. And I'll ask you to assume that he used those words, I've wasted a cop. I'll further ask you to assume that he physically shows Roberson how he wasted the cop, that he

reaches into his pocket, comes up with his finger and points his finger up to the left temple of Robert Roberson showing him how he wasted the cop. I'll then ask you to assume that at that time he washes up, washes off what appeared to be blood on his person and he changes his clothes at that time in an effort to change his identity. I'll ask you to further assume then that he leaves the trailer and sometime later he then calls the individual who I before told you about who was named Tiller. I'll ask you to assume that Tiller at that time was on his job as a dispatcher at a cab company. I'll ask you to assume further that when he was talking to Tiller over the phone, he asked Tiller if he had been listening to the news. And I'll ask you to assume further that Tiller had been listening to the news and heard about the murder of a Harker Heights police officer. I'll ask you to assume further that Tiller asked him, did you do it? And I want you to assume further please that Darren Callier responded with the words, yeah, I killed him, I shot the mother fucker in the head. And I want you to assume those are the exact words that came down. I'll further ask you to assume that Darrel Callier is next seen in the city of Killeen, Texas, in downtown Killeen. I will ask you to assume that when he's next seen we're talking about a time which would be within [3 1/2] hours of the murder. That at that time he is sober and he meets a homosexual in the city of Killeen. I'd ask you to assume that he had never met this homosexual before. I would ask you then to assume that he tells this homosexual the following story. He tells the homosexual that he had just lost his job and that he had previously been staying at the Star Motel in Killeen and that because he lost his job he couldn't pay the rent and was kicked out of the Star Motel and now he didn't have a place to stay. I'd ask you further to assume that in reliance on what he was just told, the homosexual agreed to let this Darren Callier stay at his place. I'll ask you to further assume that on the -- the time -- that night that

followed, that Darren Callier ate a full meal, conversed back and forth with the homosexual, drank beer with him and never did anything whatsoever to show remorse for what happened to the police officer and he never did anything to even indicate that he had been involved in any type of activity, criminal activity prior to meeting the homosexual. I'll ask you to further assume that during the conversation he did tell the homosexual that his real name was Thomas A. Barefoot. I'd ask you to further assume then that the homosexual the next morning is listening to the news and hears a description about -- hears first of all facts about the capital murder that occurred in Harker Heights and then hears the description of the suspect. I'll ask you then to further assume that this Thomas A. Barefoot tells him that yes, he's the person they're looking for but he further tells the homosexual that he didn't do it. I'll then ask you if you will please to assume that the homosexual is scared and that he tells Thomas A. Barefoot that he will help have him disguised and get him out of town if he so desires. I will then ask you to assume that Thomas A. Barefoot shaves off his mustache to change his identity and then changes clothes into some of the clothes that were owned by the homosexual. I'll ask you to assume that Thomas A. Barefoot chooses his next destination to be Houston, Texas. I'll then ask you to assume that the homosexual and Thomas A. Barefoot obtain a ride to Belton, Texas where Thomas A. Barefoot purchases a one way ticket to Houston and he gets on the Greyhound bus to go -- or Kerrville bus to go to Houston, Texas. I'll further ask you to assume that on his person at that time he has a knife in one pocket and a loaded [.25] caliber automatic in the other pocket. A one way ticket to Houston, a small amount of change, no changes of clothes, nothing else with him whatsoever to indicate that he is a traveler. He gets on the bus en route to Houston at that time. I'll also ask you further to assume that the pistol that he has in his pocket, he has strategically

placed behind his billfold so that if a person looks at him just with the naked eye and sees his posterior region he will see only a billfold protruding from his pocket and not see a gun. I'll ask you further to assume that the gun is in a location that if he is patted down only the billfold will be felt. You'd have to have a full blown search of his person to find the weapon that we're talking about. I'll further ask you to assume that in Houston, Texas when he arrives he is arrested by five different officers and that on his person is found the knife and the gun that I previously told you about. I would further ask you to assume that when he is transported from Houston all the way to Bell County, he sleeps in the back of the patrol car on his way to Bell County, Texas. I'll further ask you to assume that this individual is then charged with capital murder, tried for capital murder and convicted by a jury of the offense of capital murder of that Harker Heights police officer in Bell County, Texas. Now, with all that before you, Doctor Holbrook, I would ask you if that (sic) would be sufficientfacts for you then to look at and to form an expert psychiatric opinion as to what type of character traits that individual had exhibited during that period of life."

HOLBROOK'S EXPERT PSYCHIATRIC OPINION

The learned doctor, who recently committed suicide, drew the following purported psychiatric conclusions from this jury argument framed as a hypothetical question:

"Assuming all these data to be accurate, I think the first thing that becomes obvious from the data is that we have an individual who has established what is called a bad reputation as a law abiding, peace loving citizen. In something in the order of ten or twelve communities, plus or minus a few, in five states which is approximately a tenth of the whole continental area of the United States. He's been unable to establish any sort of normal kind of relationship to society but who has done just the

contrary in that magnitude. Starting as far back as [1969] which -- we're moving up on ten years at this point. Over that period of time this kind of antisocial or lack of ability to adapt to society and not only that to more (R.2092) or less reject it. To not indicate in some way behaviorally at least, whether we know what's going on in his mind or not, that they're capable of relating to any of the normal institutions that most people live by. Either religion, science or political science, church, family or whatever. And none of these kind of loyalties seem to appear with that history. Further then that we have in this history that is related to me an indication of an ascending sort of scale of criminal behavior in that the individual has been arrested a number of times for a variety of charges starting with relatively minor charges of possession of marijuana as I understand it, progressing to possession and even distribution of amphetamines, then moving to the element of adding danger to criminal behavior or possession of an illegal weapon and then a concealed weapon. There is a progression of this person actually having been confined and attempted to correct this kind of behavior at least on two occasions and indicate that that had no effect on this behavior. That it continued and accelerated throughout time. We see this person being very mobile, moving in the confines of five states that we know about -- probably -- well, I won't say that. At least five states that we know about and a number of communities that we know about. This person also has by history of this report contrived to do two things. To remain relatively anonymous by taking up an alias when it is convenient to do so. Further the individual has used that in such a way to serve their (sic) own purposes. Almost everything that is reported here indicates that not much behavior at least by history this person has done to serve purposes for anyone other than themselves (sic). So the indicators are this is extremely self-serving purpose -- person. He tends to disregard the normal values of

social life with this ascending scale maintaining anonymity and taking on an alias, to do that and maintaining considerable mobility. In the latter stages of the history the individual has continued to associate themselves (sic) with people who would perpetuate that anonymity and would even by some manipulation on their (sic) part provide them (sic) with transportation, food, lodging, without any real effort on that person's part. Assuming that all of the planning that went into this and the way it's stated, there are indicators that the individual really had in mind to commit a very serious offense and was intent upon doing it by history. This has been reported well in the book called "The Criminal Personality and Profile for Change" by Yokelman (phonetic) from Saint Elizabeth's Hospital in Washington, D.C. which is a net result of about eighteen years work of their separate life represents thirty-six years of their collective life. (R.2093-2095) They threw away about [300,000] pages of data given to them by individuals that they had evaluated there which is a criminal evaluation center and began to go upon basic data as this sort of thing, information given by family and the individual seemed to be worthless and a quarter million pages of it were thrown away after twelve years. The kind of information here shows what I have said thus far. The planning indicates what they found and what I have found over almost twenty years, that in the mind of the criminal whatever you want to call it, they operate on the basis of three things -- four really. That they have a peculiar criminal mind. That each offense they commit has been thought of many times. The only thing they need is the opportunity together with a target and anonymity and mobility. They will invaribly provide those elements if they are very actively engaged in criminal thinking. This goes on and on. This is manifest in the history that you give. In the report of the individual actually sort of bragging about an offense of a very serious nature indicates that the person derived a great deal

of personal pleasure. There certainly was no gain as far as I could determine from this data. This fits my own experience in dealing with the criminal (R.2095) what ever you want to call them diagnostically. That the primary goal of the criminal is the excitement and the ego enhancing part of criminal behavior and when this begins to have an ascending kind of order both in frequency and in seriousness and involving more and more danger, that there is no end point other than the ultimate of danger to other people and/or themselves. So all of those elements are present. This is an invariable set of circumstances and it's born (sic) out by very good evidence and these people wrote three volumns on the subject and I made a contribution of my own. In reviewing the literature on the subject most authors who are thinking straight and you think now of Yokelman reviewed that and it's available - -."

At this point petitioner's counsel interposed a hearsay objection which was sustained by the court, but Holbrook was undeterred: "Without belaboring that my opinion agrees with all of that." (R.2096)

Holbrook's opinion was "based within a reasonable psychiatric certainty.

The late doctor next, within reasonable psychiatric certainty, classified petitioner as a "criminal sociopath."

According to Holbrook "the criminal sociopath involves criminal (R.2097) behavior. The elements are normally by most authors including myself, suggest that the individual is number one, one who continues to demonstrate from early life into adulthood antisocial behavior and in the criminal its criminal antisocial behavior. These are acts that are not arrestable to arrestable kinds of behavior (sic)." (R.2098)

Holbrook basically reiterated his first conclusionary statement, connecting the history given him with the actions of a "criminal sociopath." (R.2098-2099) He found "probably six or

seven major criterias (sic) for the sociopath in the criminal area within reasonable medical certainty. Most authors accept somewhere between five and fifteen. We might add another one here and that is usually in the history of this individual you will find some indicator of violence or serious threats of violence which, if taken alone, may not be significant but if taken in this history and the context of this person's life, one might begin to take it very seriously. Another thing that might be mentioned here is another criteria and I think we're up to around seven or eight now, would be, the person escaping or running away from authority or being unwilling to accept a confrontation in the legal way in a court of law. The run away or escape is usually a part of the history. Truancy very often when they are young or it may, in fact, be present in the correctional sense or the legal sense where a fugitive or a person who had become a fugitive and run away from (R.2099) even that basic responsibility. In summary those are the characteristics of the criminal sociopath in my view and many, many other people." (R.2100)

Holbrook knew of no treatment that could be given a person such as petitioner that would make him change his personality and behavior from that of being a criminal sociopath. (R.2100) In his opinion, petitioner's personality and behavior may become accelerated within the next few years, that is what he would anticipate.It was his further opinion that within reasoable psychiatric certainty there was a probability that petitioner would commit criminal acts of violence in the future that would constitute a continuing threat to society, and this would include the society within the Texas Department of Corrections. (R.2100-2101)

On cross-examination Holbrook conceded that (1) he never examined petitioner; (2) he never had petitioner under any kind of clinical study and never observed him before he came into the

courtroom that day; and (3) he had not been present during the course of the trial. (R.2101-2102)

GRIGSON'S EXPERT PSYCHIATRIC OPINION

Doctor James Grigson who, along with Holbrook, has testified for the state in an inordinate number of capital murder cases in Texas, was asked essentially the same hypothetical question. (R.2111-2126) The second hypothetical question contained additional details about the offenses for which petitioner was arrested in Valencia County, New Mexico:

"Assume further that Thomas A. Barefoot's name had been entered into the National Criminal Information Center in Washington, D.C. for escaping from jail in Valencia County, New Mexico. . . [and that] at the time of the escape. . . [Thomas A. Barefoot was under indictment] for the following charges. Count One that [he] intentionally and unlawfully engaged in vaginal sexual intercourse with a minor child under the age of thirteen years old not then his spouse. Count Two that [he]. . . engaged in the anal sexual intercourse of a minor child under the age of thirteen old which was not his spouse. Count Three that [he]. . . restrained and confined a minor child by use of force or deception with the intent to commit criminal sexual (R.2120) penetration against the child's will." (R.2121)

The prosecutor also added the details of the escape from the Valencia County jail to Grigson's question. (R.2121)

Grigson after reviewing his credentials, asserted that, even without a medical or psychiatric examination of an individual, he would be able to give a medical opinion within reasonable psychiatric certainty as to the psychological or psychiatric makeup of an individual, provided he was given sufficient facts, information and circumstances. (R.2110)

After hearing the question, Grigson said: "This would be a fairly classical, typical, sociopathic personality disorder." (R.2128) According to Grigson the most outstanding personality

characteristic of the sociopath is the lack of a conscience. There are varying degrees of this disorder. On a scale of one to ten there is the mild sociopath, all the way up to the severe sociopath who have a complete disregard for another person's life. Based on the facts given him, Grigson would place petitioner "into your most severe category. If you go up above ten, it would be above ten but really in your most severe sociopaths. . . . There is not anything in medicine or psychiatry or any other field that will any way at all modify or change the severe sociopath. There is just not anything available." (R.2128-2129)

Grigson was then asked: "Assuming as true the facts of the hypothetical question. . . do you have an opinion within reasonable psychiatric certainty whether or not there is a probability that the defendant, Thomas Andrew Barefoot, will commit criminal acts of violence that would constitute a continuing threat to society?"

Not surprisingly, Grigson did have an opinion: "Yes, he most certainly would." This would be true, no matter where petitioner was. "It wouldn't matter whether he was in the penitentiary or whether he was free. Wherever he is he's going to continue what he's already been doing." Not satisfied with this outrageous conclusion, the prosecutor persisted: "Would you state whether or not, Doctor Grigson, you have an opinion within reasonable psychiatric certainty as to the degree of that probability that you have just expressed to this jury?"

Grigson: "Well, yes, sir, I would put it at one hundred percent and absolute."

On cross-examination Grigson denied that he was familiar with the following: (1) American Psychiatric Association Task Force Report on Clinical Aspects of the Violent Individual; (2) Dr. Bernard Diamond's article on the Psychiatric Prediction of

Dangerousness; (3) Cocozza and Stedman's article on the failure of psychiatric predictions of dangerousness published in 1976; (4) Doctor Guttmacher's Clinical Evaluation of the Dangerousness of the Mentally Ill; (5) Doctor Rubin's article on The Prediction of Dangerousness in Mentally Ill Criminals. (R.2133-2134)

Grigson said it was untrue that it was the position of the American Psychiatric Association that psychiatrists cannot reliably predict whether or not someone -- criminals in the future are going to commit future acts of violence. According to Grigson "This is that same group that found homosexuality was not an illness and this is a small minority group."(R.2134)

PETITIONER'S OBJECTIONS TO THE PSYCHIATRIC TESTIMONY

Petitioner objected to the hypothetical question posed to Holbrook because it assumed only aggravating facts and assumed no mitigating facts that were brought out during the trial; that is assumed facts that were controverted by the evidence; that in some cases it assumes what was going on in the mind of persons involved "which facts are not facts in evidence at all;" and because "there is no way that a hypothetical can be generated which will incorporate all the facts which have come before [the] jury and which would incorporate what [the] jury as determined to be true . . . [or] untrue." (R.2091)

A similar objection was interposed when Grigson testified, with the additional statement that the question was asking the witness to invade the province of the jury. (R.2126-2127)

Earlier, outside the presence of the jury, petitioner made similar objections to Grigson's testimony. (R.2042-2044)

OBJECTIONS TO THE PSYCHIATRIC TESTIMONY ON APPEAL

On appeal to the Court of Criminal Appeals of Texas, petitioner argued that psychiatrists, as a group, are not qualified by education or training to predict future behavior. (Barefoot v. State, --S.W.--, No. 63,715, page 18, Appendix "B")

The Court, id at page 19, specifically rejected this

contention:

"This Court is well aware that the ability of psychiatrists to predict future behavior is the subject of widespread debate. However, we are not inclined to alter our previously stated view that a trial court may admit for whatever value it may have to a jury psychiatric testimony concerning the defendant's future behavior at the punishment stage of a capital murder trial. Chambers v. State, 568 S.W.2d 313 (Tex.Crim.App. 1978); Moore v. State, 542 S.W.2d 664 (Tex.Crim.App. 1976)."

No member of the Court dissented from this view.

SUMMARY OF ARGUMENT

The Court has before it now, in Estelle v. Smith, No. 79-1127, 602 F.2d 694 (5 Cir. 1979), issues involving the state's use of psychiatric testimony in support of an affirmative answer to punishment issue number two, where the accused was actually examined by the testifying psychiatrist.

Interwoven with the Smith contentions is the claim there raised in the brief amicus curiae for the American Psychiatric Association that the use of psychiatric testimony in a capital case on the issue of whether a defendant is likely to commit serious crimes in the future is constitutionally invalid because it undermines the reliability of the fact finding process.

Here, the state has refined the punishment procedure by having two psychiatrists, one of them being the same Doctor Grigson who testified for the state in the Smith case, testify, based upon a hypothetical question which incorporated all of the state's evidence at both stages of the bifurcated trial, that the petitioner "most certainly would" commit criminal acts of violence that would constitute a continuing threat to society. Grigson put the degree of probability "at one hundred percent and absolute." (R.2131)

The Court of Criminal Appeals of Texas, with no voice raised in dissent, asserted that the use of expert testimony and the testimony of experts based upon hypothetical questions, is a matter of state law and, under the peculiar Texas statutes, within the exclusive discretion of each individual trial judge, who may admit any evidence he deems relevant to sentence.

Such claim must yield to this Court's requirement for reliability in the determination that death is the proper punishment after conviction of a capital offense.

The global purview of the Texas punishment issue predicated upon a finding of future dangerousness, requires exclusion of psychiatric predictions of future dangerousness as a matter of federal constitutional law, and petitioner here incorporates the Summary of Argument contained in the amicus brief for the American Psychiatric Association.

Second, even if psychiatric predictions of future dangerousness, based upon a legitimate psychiatric and medical examination, be proper at the punishment stage of a capital trial, where these predictions are based, as here, solely upon a hypothetical resume of the same evidence, embellished with the prosecutor's conclusions, submitted to the jury with no medical or psychiatric evidence requiring expert analysis for the assistance of the jury in resolving the issue of future dangerousness, the punishment proceeding is distorted, the petitioner is denied a fair hearing by the fact finders, and the state is permitted to bolster its non-medical and non-psychiatric evidence with the gloss of medical expertise.

Third, Grigson's flat prophecy that petitioner "most certainly would" commit future criminal acts of violence that would constitute a continuing threat to society, and that the probability of such future conduct was "one hundred percent and absolute," within reasonable psychiatric certainty, eliminated the state's burden of proving an affirmative answer to punish-

ment issue number two beyond a reasonable doubt, deprived the petitioner of his statutory right to have his punishment fairly assessed by the jury, and denied him fundamental fairness and due process of law.

ARGUMENT

The petitioner adopts the argument under point I, pages 11 through 17, of the amicus brief for the American Psychiatric Association, filed in Estelle v. Smith, --U.S.--, No. 79-1127, and submits that the issue of the reliability of psychiatric predictions of long-term future criminal behavior was squarely raised in and rejected by the Court below.

The evil of such predictions, at least by practitioners like Grigson and Holbrook, under the Texas capital punishment statutes, is that they eliminate the jury's need to consider mitigating evidence. There is no cure, according to these experts, for the criminal sociopath. Thus this Court's reliance upon the following assurances by the Court of Criminal Appeals of Texas, in Jurek v. State, 522 S.W.2d 934, 939-940(Tex.Crim.App. 1975), cited with approval in Jurek v. Texas, 428 U.S. 262, at 272-273 (1976), is misplaced:

"In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand."

There is likewise no room in the "criminal sociopath" category for consideration of the youth of the offender, the

influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct. Roberts v. Louisiana, 431 U.S. 633, 637 (1977).

Equally immaterial is the fact that the offender was a party to but did not himself commit the murder. Lockett v. Ohio, 438 U.S. 586 (1978)

All of these mitigating circumstances are moot under the Grigson-Holbrook caveat that there is no known cure for the sociopathic personality. What matters, then, the age of the offender, his part in the crime, whether he was acting under duress or was under the domination of another, whether he was under an extreme form of mental or emotional pressure, the fact that he was under the influence of drugs or alcohol, or the fact that he reasonably believed in the existence of circumstances which provided a moral justification for his conduct? Even if all these factors be true, if he is a sociopath, he must die.

The Grigson-Holbrook prophecies carefully eliminate the jury's need to consider life imprisonment for the offender. He will be a danger to the inmates and personnel of the Texas Department of Corrections. This all adds up to a mandatory affirmative answer to the second punishment issue and a mandatory sentence of death for the offender.

It can thus be seen that the reliability of such opinions goes to the very heart of the punishment proceedings in Texas capital murder trials.

A majority of this Court swept aside a state procedural rule which excluded relevant and reliable mitigating evidence at the punishment proceeding, holding that such exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. Green v. Georgia, 442 U.S. 95 (1979).

The harm is just as great to a convicted capital offender where the state procedural rule or statute permits the admission

of potentially unreliable and bolstering aggravating evidence at the punishment proceeding. Cf. Gardner v. Florida, 430 U.S. 349 (1977).

In Gardner, three Members of this Court agreed that the sentencing process of a capital trial must satisfy the requirements of the Due Process Clause and that sentencing is a critical stage of a capital criminal proceedingat which the defendant is entitled to the effective assistance of counsel.

As Mr. Justice Stevens noted in Gardner:

> ". . . [F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country."

and:

> "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." 430 U.S. at 357-358.

Both psychiatrists in petitioner's case reached their standard boilerplate psudo-psychiatric conclusions upon non-medical and non-psychiatric facts. A person's reputation for being a peaceful and law abiding citizen in various communities may or may not have either legal or medical significance. Doubtless the late Doctor Martin Luther King had such a reputation over a wider georgaphic range than did thepetitioner in the same circles that established petitioner's reputation.It is interesting to note how quickly Holbrook became a legal advocate when he analyzed this evidence, pointing out that petitioner had a bad reputation as a peaceful and law abiding citizen in "ten or twelve communities, plus or minus a few, in five states which is approximately a tenth of the whole continental area of the United States." Later Holbrook expanded on this geographic opinion by saying that petitioner was very

mobile, moving in the confines of five states "that we know about" and a "number of communities that we know about."

Then, even though Holbrook had remarked about this far-flung reputation, he found significance in the fact that the petitioner had used an alias in Bell County, after his escape from the New Mexico jail. This showed that petitioner tended to disregard the normal values of social life with this ascending scale maintaining anonymity and taking on an alias while at the same time maintaining considerable mobility.

Grigson made no effort to correlate petitioner's "history" as recounted by the prosecutor with his standard conclusions.

A reading of the testimony of these psychiatric witnesses makes one wonder what they could have done with chicken entrails, or a flight of birds.

Petitioner's court-appointed counsel made no effort to counter this damaging testimony, either by a searching cross examination into the fraudulent basis of the expert conclusions or by defensive psychiatric witnesses. The record does not reveal the reason for this supine surrender, but petitioner's present lawyer is well aware of the extreme difficulty confronting court appointed counsel for an indigent capital defendant in obtaining medical or psychiatric assistance of any sort.

CONCLUSION

The sentence of death in this cause should be set aside for all the reasons stated above.

Respectfully submitted

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CLERK'S OFFICE

COURT OF CRIMINAL APPFLAS

AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 63,715, styled:

THOMAS A. BAREFOOT — Appellant

VS.

STATE OF TEXAS — Appellee

the judgment of the 27th. Judicial District Court of Bell County, Texas was AFFIRMED, on March 12, 1980, the Appellant's Motion for Leave to File Motion for Rehearing was Denied on April 30, 1980. The Appellant's Motion to Stay Issuance of Mandate was Granted on April 30, 1980 for 30 days and the Mandate of this Court issued on June 2, 1980.

THEREFORE, WITH THE DENYING OF THE APPELLANT'S MOTION FOR LEAVE TO FILE MOTION FOR REHEARING, this cause was disposed of by this Court on June 2, 1980, the appellant having exhausted all remedies of this, The Court of Criminal Appeals of Texas and the judgment has now become final on the docket of this Court.

WITNESS my hand and the seal of said Court, at my office in Austin, Texas, this the 21st. day of July, A. D., 1980.

THOMAS LOWE, Clerk of the
Court of Criminal Appeals
of Texas

APPENDIX "A"

THOMAS A. BAREFOOT, Appellant
aka DARREN CALLIER

NO. 63,715 v. -- Appeal from BELL County

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a conviction for capital murder. The punishment is death.

Appellant contends that the trial court erred by failing to instruct the jury at the guilt-innocence stage of the trial on the law of circumstantial evidence, denying his motion for change of venue, overruling his challenges for cause of three prospective jurors, refusing his request for additional peremptory challenges, admitting evidence of extraneous offenses, failing to define "probability" in the charge at the punishment stage, and overruling his objections to the testimony of two witnesses as to the probability he would commit acts of violence in the future. Appellant also contends that Art. 37.071, V.A.C. C.P., is unconstitutionally vague.

Appellant was convicted for the murder of Harker Heights police officer Carl Levin. The appellant fatally shot Levin after the officer stopped him for questioning in an arson investigation. Although appellant does not contest the sufficiency of the evidence, a detailed review of the testimony is required in order to discuss his contention that the circumstantial evidence charge should have been submitted to the jury.

Appellant and four other persons were living in a trailer in Killeen during the summer of 1978. One of the appellant's roommates, Donnie Ray Tiller, testified that appellant had asked him for a gun and stated that he intended to kill a Harker Heights policeman who had allegedly mistreated him during an arrest for public intoxication. Appellant also told Tiller of his plans to commit various robberies in Harker Heights.

APPENDIX "B"

On August 6, 1978, appellant told Tiller that he was going to commit a robbery the next morning at the Oasis Club in Harker Heights after creating a diversion by bombing or setting fire to a building. Appellant stated to Tiller that he would kill anybody who recognized him as the robber. Appellant was wearing a white T-shirt and blue jeans at the time of this conversation.

Another roommate, Robert Roberson, testified that appellant awakened him at approximately 4:30 a.m. on October 7 and asked him for a ride to Harker Heights. Appellant was wearing a white T-shirt and blue jeans, and was armed with a .25 caliber automatic pistol and a home-made bomb. On the way to Harker Heights, appellant told Roberson he was going to blow up the Silver Spur, a night club. After first stopping at a convenience store where appellant filled an empty plastic milk jug with gasoline, Roberson dropped appellant off near the Silver Spur at about 5:00 a.m. and returned to the trailer.

John Edwards, a soldier at Fort Hood, drove past the Silver Spur at 5:15 a.m. He saw flames coming from the roof and a man he identified as appellant standing in the parking lot. As Edwards watched, appellant began to run along Highway 190. Edwards drove to the police station, which was nearby, to report the fire and then returned to the Silver Spur. On his way back to the fire, Edwards saw appellant near the intersection of Highway 190 and Amy Lane.

Back at the fire, Edwards saw a fireman remove a melted plastic jug from the roof of the building. He then told Officer Levin what he had seen. Levin, who was in uniform and driving a marked patrol car, left the scene of the fire and drove toward Amy Lane.

Michael Thrash, another Fort Hood soldier, lived on Amy Lane. He was walking to work at 5:35 a.m. when he saw a patrol car parked at the intersection of Amy Lane and Valley Road with its emergency lights on and its spotlight trained on some bushes. Officer Levin was standing beside the patrol car. A man wearing a white T-shirt and blue jeans stepped out of the bushes and walked toward the officer. The man then shot Levin in the head at point-blank range and fled down Valley Road.

Mary Richards, who lived on Valley Road, heard the shot and looking through a window, she saw a man wearing a white T-shirt running down Valley Road from Amy Lane. Richards could not positively identify appellant, but testified he resembled the man she saw.

Appellant called Tiller at approximately 10:30 a.m. on the morning of the shooting. Tiller described the conversation as follows:

> "I answered the phone. He said, Donnie, I said, yes. He said this is Darren. He says have you been listening to the news? And I said, yes, Darren, did you do that? He said, Yeah, I shot him. I killed the mother fucker. I shot him in the head."

Tiller testified that this conversation was in reference to the August 7 shooting of the Harker Heights policeman. After appellant hung up, Tiller contacted the police.

Appellant returned to the trailer after the shooting and spoke to Roberson. Roberson testified that appellant was still dressed in a white T-shirt and blue jeans, had red blotches which appeared to be blood on his face and shirt, and appeared to be in a state of panic. After Roberson told him that the police had been to the trailer looking for him, appellant said that "he had to get out of town because he wasted a cop, that he killed a cop." Asked by Roberson how he had done it, appellant reached for his back pocket and then pointed his finger at

Roberson's head at the place corresponding to the bullet wound to the head of the deceased. After washing up and changing clothes, appellant left the trailer.

Francisco Hernandez testified that he met appellant in downtown Killeen on the morning of August 7. He invited appellant to his home for lunch and subsequently offered to let him spend the night. The next morning, after hearing a radio news report describing the suspect in the Levin murder, appellant told Hernandez that "I am the one that they're looking for but I didn't kill no policeman."

Appellant subsequently made his way to Belton, where he boarded a bus for Houston. Police acting on information from Hernandez arrested appellant at the bus station in Houston at approximately 11:30 p.m. August 8. A .25 caliber automatic pistol that ballistics tests proved fired the bullet that killed Levin was in appellant's pocket at the time of his arrest.

David Kingsley was acting Chief of Police for Harker Heights at the time of the charged offense. He testified that Officer Levin was the only peace officer killed in Bell County on August 7, 1978.

If the accused admits or confesses killing the deceased, proof of the admission or confession is direct evidence of the main inculpatory fact and a charge on circumstantial evidence is not required. Sloan v. State, 515 S.W.2d 913 (Tex.Cr.App. 1974); Hurd v. State, 513 S.W.2d 936 (Tex.Cr.App. 1974); Swift v. State, 509 S.W.2d 586 (Tex.Cr.App. 1974). However, if the admission or confession is equivocal as to the killing of the deceased, or if it is not clear that the killing admitted or confessed is the killing with which the defendant is accused, proof of the admission or confession alone will not relieve the trial court of the necessity of giving a circumstantial evidence charge. Ridyolph v. State, 544 S.W.2d 784 (Tex.Cr.App. 1977); Hielscher v. State, 511 S.W.2d 305 (Tex.Cr.App. 1974); Martinez v. State, 207 S.W.2d 387 (Tex.Cr.App. 1948). Even if the confession is equivocal, a circumstantial evidence charge is not

necessary if the other evidence, together with the confession, conclusively establishes that the killing confessed is the killing for which the defendant is on trial. Ridyolph v. State, supra; Hogan v. State, 496 S.W.2d 594 (Tex.Cr.App. 1973); Steel v. State, 459 S.W.2d 649 (Tex.Cr.App. 1970); Patterson v. State, 416 S.W.2d 816 (Tex.Cr.App. 1967).

Tiller testified that appellant's admission to him that he "shot him in the head" was in reference to the shooting of the Harker Heights policeman on August 7. Officer Levin, who was shot in the head, was the only peace officer in Bell County killed that day. Appellant told Roberson that he "killed a cop" and described the shooting in a manner consistent with the murder of Levin. Appellant was seen in the area a few minutes prior to the shooting wearing a white T-shirt and blue jeans, the witness to the shooting testified that the assailant was dressed in that fashion, and Roberson testified that appellant was so dressed when he returned to the trailer splattered with blood. These facts, together with the other evidence discussed above, leave no reasonable doubt that the killing admitted by appellant was that of Officer Levin. Therefore, the admissions are direct evidence of the main inculpatory fact and the trial court did not err in refusing to charge on the law of circumstantial evidence. See and compare Ridyolph v. State, supra; Casey v. State, 525 S.W.2d 658 (Tex.Cr.App. 1975); Hielscher v. State, supra; Hogan v. State, supra; Steel v. State, supra; Patterson v. State, supra.

Appellant contends that the trial court erred by refusing his motion for a change of venue. Appellant argues that news accounts of the shooting had created such a prejudice against him that he could not obtain a fair and impartial trial in Bell County.

The trial of appellant commenced eighty-three days after the commission of the offense. The hearing on the change of venue motion was held September 20, 1978, forty-four days after the shooting. Six residents of Bell County testified that in their opinion appellant could not receive a fair trial in the county at the time of the hearing of the motion. However, four of these witnesses stated during cross-examination that they could be fair and impartial if selected as jurors. Appellant's other witnesses were employees of local newspapers and radio and television stations. Each described the coverage appellant's case had received and identified copies of newspaper stories and transcripts of broadcasts that were admitted in evidence. On cross-examination, these witnesses stated that the purpose of their news coverage had been to inform, not to inflame, the public, that they believed appellant could receive a fair trial, and that they could be impartial jurors.

The State called eleven witnesses to testify that there was not such a prejudice against appellant in Bell County that he could not receive a fair trial. The State also introduced evidence showing that the county's population was between 125,000 and 158,000; that there were 45,000 registered voters in the county; and that the four largest cities in the county were Killeen, population 52,000, Temple, population 48,000, Harker Heights, population 10,500, and Belton, population 10,000.

The evidence raised fact issues whether appellant could obtain a fair and impartial trial in Bell County. These issues were decided adversely to appellant when the trial judge, as the trier of fact, overruled the motion for change of venue. Von Byrd v. State, 569 S.W.2d 883 (Tex.Cr.App. 1978); Freeman v. State, 556 S.W.2d 287 (Tex.Cr.App. 1977).

Although appellant did not renew his motion for change of venue, it is instructive to consider the voir dire examination of prospective jurors which began October 31, 1978. Both appellant and the State agree that of the 132 prospective jurors examined, 63 had heard something about the case through news reports and 21 had formed an opinion that appellant was guilty. They also agree that 11 of the jurors selected had heard about the case, but all testified that they could be fair and impartial and would base their verdict on the evidence presented in court.

Finally, we have examined the newspaper stories and broadcast transcripts in the record and find that they are factual and not inflammatory. They do not in themselves establish prejudice or require a change of venue. Freeman v. State, supra; Knight v. State, 538 S.W.2d 101 (Tex.Cr.App. 1975).

We find no evidence that appellant did not receive a fair trial by an impartial jury free from outside influence. The trial court did not abuse its discretion in overruling the motion for change of venue.

Appellant contends that the trial court erred in overruling his challenges for cause to three venire members and in failing to grant his request for additional peremptory challenges. Two of these venire members, Johnnie Kopriva and Robert Latsha, were peremptorily challenged by appellant after his challenges for cause were overruled. Appellant subsequently exhausted his peremptory challenges and, after his challenge for cause to venire member James Smith and his request for additional peremptory challenges were overruled, was forced to accept Smith as a juror despite his declaration that Smith was an objectionable juror. Thus, appellant properly preserved the alleged errors. Hernandez v. State, 563 S.W.2d 947 (Tex.Cr.App. 1978); Wolfe v. State, 178 S.W.2d 274 (Tex.Cr.App. 1944).

Appellant contends that venire member Kopriva was biased against a portion of the law on which appellant was entitled to rely. Specifically, he argues that Kopriva was unable to accept appellant's right to remain silent and present no evidence in his defense. This contention is based on the following voir dire examination by defense counsel:

"Q. Do you feel -- and many people do, so you would not necessarily be in the minority -- do you feel that a person accused of a criminal offense should be required to come in the courthouse and defend himself, stand up and defend himself?

"A. No, sir.

"Q. Do you feel that he should be required to put on any evidence of any type in the defense of his case?

"A. Yes, sir.

"Q. You feel that he should, sir?

"A. Yes, sir, he should. His lawyer should put a defense on if that's what you mean.

"Q. Yes, sir. That's what I'm asking.

"A. Yes, sir.

"Q. You feel that way, even though the law allows for the defendant to sit silently and not put on any evidence?

"A. I don't think that I understand that question, sir.

* * * *

"Q. A moment ago you kind of indicated that you felt he should put on some evidence.

"A. I didn't understand the question, though.

"Q. All right. To make sure we understand then, you're saying that he does not have to put on any evidence to satisfy you?

"MR. EADS: Objection, Your Honor.

"THE COURT: Overruled.

"Q. If you will answer my question, please, sir. You are saying again that a defendant does not have to put on any evidence to satisfy you that he's not guilty?

"A. No, sir. I think the lawyers should present their evidence of the case because --

"Q. You can explain that answer if you would like to, sir.

"A. Well, even though the State proves its case and -- well, I would still like to hear the other side of the story."

After this exchange with defense counsel, the prosecutor explained to the venireman the State's burden of proof and the defendant's Fifth Amendment privilege. Kopriva indicated that he understood and that he would not hold appellant's silence against him. Defense counsel then reexamined Kopriva as follows:

"Q. Mr. Kopriva, Mr. Eads has done an excellent job of outlining for you what the law says and what the constitution says.

"A. Yes, sir.

"Q. You are certainly a mature adult, and you certainly have the option at this point of stating to us that you disagree with that law. All right, sir?

"A. (Headnod.)

"Q. So, that's really what I'm asking you. Do you, even though the law may say that the defendant has a right to remain silent, the law may say that the defendant can sit here and not open his mouth, the law may say that the defense counsel can sit here and not open their mouths. Do you yourself still feel that the lawyers should at least put on some evidence or that the defendant should at least take the stand?

"A. No, sir. I understand the question now. If he proves his case beyond a reasonable doubt that the defendant is guilty, well then, I'm sure that y'all are not going to sit there and just let -- without saying a word -- I mean, that's what the trial is about.

"Q. I'll admit we are kind of stretching it a little bit.

"A. Yes, sir.

"Q. And certainly we will be talking just as we are talking here today.

"A. Yes, sir.

"Q. But let's say we do all of our talking out here at the counsel table and no evidence of any kind is put forth in behalf of the defendant.

"A. Yes, sir.

"Q. Do you feel that a defendant should put on some evidence of some kind in order to refute or to contest his guilt?

"A. No, sir. I leave that up to the defendant."

It is obvious that Kopriva was initially confused as to the relationship between appellant's right to remain silent and his right to effective assistance of counsel. Subsequent questioning by both the prosecuting attorney and defense counsel makes it clear that Kopriva did not expect appellant to testify or present other evidence but only that his attorneys would do their best on his behalf. The trial court did not err by overruling the challenge for cause. Scott v. State, 490 S.W.2d 578(Tex.Cr.App. 1973).

Appellant contends that his challenge for cause to venire member Robert Latsha should have been granted because he believed that death is the only proper punishment for capital murder. This contention is based on the following exchange with defense counsel:

"Q. Okay, let's assume that the State puts on -- here again, a hypothetical case, the State puts on -- that you were sitting in a capital murder case and the State proved beyond a reasonable doubt, satisfied you that the individual, that the defendant in that particular case caused the death of a police officer by shooting him with a gun and that the defendant knew he was a police officer and knew he was acting in the lawful discharge of his duties.

"Now, do you have an opinion, having found that man guilty, as to what proper punishment would be in that case?

"A. Do I have an opinion as to what the proper punishment would be?

"Q. Yes, sir.

"A. I thought the way it was stated, there is only one punishment for capital murder.

"Q. All right. What do you believe the one punishment is for capital murder?

"A. The death penalty.

"Q. All right. And do you believe that should be the proper punishment for capital murder?

"A. Yes, sir.

"Q. And that's an affirmative opinion of yours?

"A. Yes, sir.

"Q. And is that an opinion that you have arrived at as a result of your past experience and your upbringing and your thinking that you have indicated that you have made about the death penalty?

"A. Yes, sir.

"Q. And it would be your position that if a capital murder case, involving the shooting of a police officer, that if that -- if the individual was proven guilty beyond a reasonable doubt that he shot a police officer who was in the lawful exercise of his duties and knew that man was a police officer when he shot him, that in your mind the only proper punishment that could be given would be the death penalty?

"A. Yes, sir."

Prior to this exchange, the prosecutor, during his voir dire, had stated to the venireman that the law provides that the punishment for capital murder "shall be death." That this misled Latsha is indicated by his statement to defense counsel that, "I thought the way it was stated, there is only one punishment for capital murder." After the punishment alternatives and procedure were better explained, Latsha clearly stated that he would affirmatively answer the punishment issues only if the State met its burden of proof and that he believed death to be the proper punishment only if the answers to the issues were yes. No error is shown.

Appellant contends juror James Smith expressed an opinion as to his guilt and a bias against the minimum punishment for

murder during his voir dire examination. The first contention is based on the following exchange with defense counsel:

"So since we have had publicity in this case I have to ask you, sir, whether or not, based on what you've read and maybe something you've heard from discussions at Fort Hood with people that you work with, whether you've formed an opinion as to the guilt or the innocence of this man?

"A. An opinion. I don't know whether it would be an opinion -- an assumption I would say -- assuming -- I don't know.

"Q. Well, now, I don't know that it really requires, I think, whether you call it an opinion or assumption. Let me ask you this. Would it require some evidence for you to set aside that assumption or feeling that you have?

"A. I'm not a lawyer but it seems to me like if he was found with a weapon that would be pretty conclusive in my way of thinking. If it was proved to be the weapon that shot the policeman.

"Q. I understand what you're saying.

"A. I don't know.

"Q. And the point I'm trying to make, of course, is the State has gone over when we say the State has the burden of proof, what does that mean to you?

"A. It means they have to prove it beyond a doubt.

"Q. Alright, now, sometimes we have individuals and everyone's opinion, of course, they're entitled to their opinion and sometimes a person's opinion agrees with the law and sometimes it doesn't. Sometimes their feelings agree. We can't help but have feelings established about something and the only thing that I'm trying to get at is because of what you read and because of this feeling that you have, for example about the gun, would you require the defendant to produce evidence of his innocence to you before you could set aside these feelings?

"MR. EADS: I'll object to the question, Your Honor. He's said that he would make the State prove the burden of proof, your Honor.

"THE COURT: Overruled. Answer the question.

"A. I think the State would have to prove it.

"Q. . . ..You still would agree that you have formed some sort of feelings about this case?

"A. As to the guilt or innocence?

"Q. Yes, sir.

"A. An opinion, yes. I have formed an opinion but now whether it's been proven I don't know whether I'm correct or not.

* * * *

"Q. Let me ask you this, sir. If you were serving as a juror on a criminal case, not necessarily this case and at the close of evidence you felt like the defendant was probably guilty but you weren't sure beyond a reasonable doubt, how would you feel compelled to vote in the jury-room?

"A. You would have to prove to me that he was guilty as a juror before I would say guilty."

In Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), the Supreme Court said:

> "The constitutional standard of fairness requires that a defendant have 'a panel of impartial, "indifferent" jurors.'Irvin v. Dowd, 366 U.S.[717]at 722. Qualified jurors need not, however, be totally ignorant of the facts and issues involved.
>
> > "'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' Id., at 723.
>
> "At the same time, the juror's assurance that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' Ibid."

421 U.S. at 799, 800.

The voir dire of Smith fails to show that he would be influenced as a juror by any opinion or prejudice or by anything he may have heard or read about the case. The trial court did not err in overruling appellant's challenge for cause based on Smith's alleged opinion as to appellant's guilt. Freeman v. State, supra.

Appellant's contention that Smith was biased against the minimum punishment for murder is based on the following voir dire examination by defense counsel:

"Q. And murder being defined the same way, the knowing and intentional killing of another human being. Do you feel like that in a murder case that you could consider as little as five years as a punishment?

"A. I don't think so, sir.

"THE COURT: Counsel, you need to explain to him that you're talking about not this case but a proper case.

"Q. Right. We're not talking about any particular murder case. The definition of murder never changes. Murder is always the intentional and knowing killing of another human being. But the facts change.

"A. Yes, sir.

"Q. And we have different facts and different cases so we have a range of punishment that varies. But even so some people themselves feel that since the definition never changes that they just could not go along with what the law says and give somebody as low as five years for the intentional and knowing killing of another human being.

"A. I think my answer would have to depend on the facts of the case involved, would it not? That's a hard question for me to answer.

"Q. I understand, sir. I'm just --

"A. I'm not trying to hedge, I just don't know the answer.

"Q. I understand what you're saying. And as the judge said we're not talking about a particular case, but we do have the same definition regardless of what the facts are and so I'm just talking about where you have the knowing and intentional killing of another human being.

"A. If it's obvious murder I don't think five years is -- I don't see the five years.

"Q. Where do you get this opinion from?

"A. I just don't believe in murder.

"Q. Alright. You understand, of course, that as the judge has said, we don't know what the facts would be and I would submit to you that there are all kinds of facts --

"A. Yes, sir.

"Q. And that some facts there may be some sort of mitigating circumstances and I don't know what those mitigating circumstances would be but still you would think that regardless of what was shown to you that you would still be unable to give five years in a case for the knowing and intentional killing of another human being?

"A. Yes, sir, I don't think I could."

Thereafter, the prosecutor sought to rehabilitate the juror by demonstrating the wide range of fact situations that may fall within the murder statute. The prosecutor then questioned Smith as follows:

"The point I'm trying to make, Mr. Smith, is this. You can see why we have a range of punishment for murder.

"A. Yes, sir, I see.

"Q. And all I'm saying is, do you feel like that as a juror in the State of Texas, that you could sit and listen to the evidence and consider the full range of punishment in a criminal case. If it's a murder case you could consider not less than five years or life in the Texas Department of Corrections in that proper case where the facts justified it. Where the law allowed it and the circumstances warranted that particular punishment? That's the point I'm trying to make."

Smith stated that he could consider the minimum punishment in a proper case. The record does not support appellant's contention that Smith could not give the minimum punishment of five years and that the juror was subject to challenge for cause pursuant to Art. 35.16(c)(2), V.A.C.C.P. Von Byrd v. State, supra.

Since we have concluded that Kopriva, Latsha, and Smith were not excludable for cause, it follows that appellant was not wrongfully deprived of a peremptory challenge upon a venire member who was subject to challenge for cause or forced to accept such a venire member as a juror. Thus, the trial court did not abuse its discretion in denying appellant's request for three additional peremptory challenges. Von Byrd v. State, supra; Burns v. State, 556 S.W.2d 270 (Tex.Cr.App. 1977).

In twelve grounds of error, appellant complains of the admission of evidence offered to show a motive for the commission of the instant offense that also shows he committed extraneous offenses in New Mexico. Michael Roach, a deputy sheriff in Valencia County, New Mexico, testified that he arrested appellant on October 29, 1977, for criminal sexual penetration of a minor and later took him before a magistrate for arraignment. John Horecek, a magistrate in Valencia County, testified that he arraigned appellant on November 1, 1977. At this time, Horecek informed appellant that he was charged with two counts of sexual penetration of a minor carrying a maximum punishment of imprisonment for life and one count of kidnapping carrying a maximum punishment of imprisonment for fifty years, and set bail at $100,000. Ronald Childress, a New Mexico attorney, testified that he represented appellant in regard to these charges and that a trial was set for January 30, 1978. Lawrence Romero, sheriff of Valencia County, Daniel Hawkes, a deputy sheriff, and Velma Hardesty, the jailer, testified that appellant escaped from the Valencia County jail on January 9, 1978. These witnesses identified and the trial court admitted in evidence certified copies of the complaint, indictment, and arraignment in the sexual penetration and kidnapping case, and an indictment and arrest warrant charging appellant with escape.

In its charge to the jury, the trial court limited the jurors' consideration of these extraneous offenses to the question of appellant's motive for killing the deceased. One of the exceptions to the general rule that an accused is entitled to be tried on the accusation made in the State's pleading and not for some collateral crime or for being a criminal generally is that evidence showing a motive is admissible even though it also shows the commission of an extraneous offense. Hughes v. State, 563 S.W.2d 581 (Tex.Cr.App. 1978); Cherry v. State, 488 S.W.2d 744 (Tex.Cr.App. 1972); Rodriguez v. State, 486 S.W.2d 355 (Tex.Cr.App. 1972); Stephens v. State, 182 S.W.2d 707 (Tex. Cr.App. 1944).

Although several cases in which extraneous offenses were held admissible to show motive were prosecutions for escape or for offenses growing out of an escape, appellant is mistaken when he argues that the rule of admissibility is limited to this narrow fact situation. In Hughes v. State, supra, the defendant shot a police officer who had stopped him for investigation of a reported case of credit card abuse. This Court held that the defendant's extortion conviction in an Alabama federal court seven months prior to the shooting, which resulted in a three-year probated sentence, was admissible to show motive. In Cherry v. State, supra, the defendant's escape from a Georgia penitentiary, where he was serving a life sentence, was held to be admissible to show his motive for shooting a police officer eight months later. To the same effect are Washburn v. State, 318 S.W.2d 627 (Tex.Cr.App. 1958)(evidence that the defendant attempted to extort money from his victim four years prior to the murder) and Ellisor v. State, 282 S.W.2d 393 (Tex.Cr.App. 1955)(evidence that the defendant committed a burglary two days prior to shooting a police officer who stopped him for speeding.)

Appellant argues that it was unnecessary to admit the New Mexico offenses because there was other evidence of motive, including the apparent arson at the Silver Spur and statements appellant had made to friends threatening to kill a Harker Heights policeman. That appellant may have had other motives for killing Levin, however, does not mean that he was not motivated by a desire to avoid his return to New Mexico. See Hughes v. State, supra; Ellisor v. State, supra. The trial court did not err in admitting the evidence of extraneous offenses for the limited purpose of showing motive.

Appellant contends that the trial court erred by refusing to define "probability" in its charge to the jury at the punishment stage of the trial. This Court has previously held that such a definition is not required. King v. State, 553 S.W.2d 105 (Tex.Cr.App. 1977). No error is presented.

Two psychiatrists, Drs. John Holbrook and James Grigson, were called by the State to testify at the punishment stage of the trial. Both doctors were given a hypothetical fact situation based on the evidence in this case and asked if the individual described in that question would probably commit future acts of violence that would constitute a continuing threat to society. Both doctors testified that in their opinion he would do so.

Appellant argued at the trial, as he does now on appeal, that Holbrook and Grigson were not qualified to give an opinion as to his future conduct because they had not personally examined him and based their opinions solely on the State's hypothetical question. Appellant also argues that psychiatrists, as a group, are not qualified by education or training to predict future behavior. Appellant does not contest the individual qualifications of either witness.

This Court is well aware that the ability of psychiatrists to predict future behavior is the subject of widespread debate. However, we are not inclined to alter our previously stated view that a trial court may admit for whatever value it may have to a jury psychiatric testimony concerning the defendant's future behavior at the punishment stage of a capital murder trial. Chambers v. State, 568 S.W.2d 313 (Tex.Cr.App. 1978); Moore v. State, 542 S.W.2d 664 (Tex.Cr.App. 1976).

The trial court did not err by permitting the doctors to testify on the basis of the hypothetical question. The use of hypothetical questions in the examination of expert witnesses is a well established practice. 2 C. McCormick and R.Ray, Texas Evidence, Sec. 1402 (2d ed. 1956). That the experts had not examined appellant went to the weight of their testimony, not to its admissibility.

Appellant argues that the hypothetical question was improper because it was not based on all of the evidence in the case. Although a hypothetical question must be based on the facts of the case, counsel may assume the facts in accordance with his theory of the case. If the opponent desires to secure the expert's opinion upon a different set of facts he may do so on cross-examination. Atkinson v. State, 511 S.W.2d 293 (Tex.Cr. App. 1974); Knoeppel v. State, 382 S.W.2d 493 (Tex.Cr.App. 1964); McMurrey v. State, 168 S.W.2d 858 (Tex.Cr.App. 1943); Davis v. State, 114 S.W. 366 (Tex.Cr.App. 1908). These grounds of error are overruled.

Appellant also contends that Holbrook and Grigson should not have been permitted to express an opinion as to the probability of future violent behavior on his part because such testimony constitutes a legal conclusion. Appellant cites the case of Carr v. Radkey, 393 S.W.2d 806 (Tex.Sup. 1965). In that case, the Court held that

> "a witness may not be asked whether a testator had the mental capacity to make and publish a will because, under Brown v. Mitchell [31 S.W. 621 (Tex.Sup. 1895)] whether a person has mental capacity to execute a will involves a legal definition and a legal test. A witness may be asked, assuming he knows or is a properly qualified expert, whether the testator knew or had the capacity to know the objects of his bounty, the nature of the transaction in which he was engaged, the nature and extent of his estate, and similar questions." 393 S.W.2d at 813.

Appellant argues that a witness should not be permitted to testify that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society because the question involves a legal definition and a legal test.

Appellant's contention is without merit for the simple reason that "probability," "criminal acts of violence," and "continuing threat to society" are not terms defined by statute or case law. On the contrary, they are words of ordinary meaning. King v. State, supra. Thus, the testimony in question did not involve the application of a legal definition or test. We also note that if appellant were correct in arguing that a witness may not express an opinion on a matter involving a legal definition or test, this would, among other things, prevent the routine practice of asking a psychiatrist whether, in his opinion, the defendant was legally insane at the time of the offense. V.T.C.A. Penal Code, Sec. 8.01.

Finally, appellant contends that Art. 37.071, V.A.C.C.P., is unconstitutional because the term "probability" is so vague that men of common intelligence must guess as to its meaning and application. This contention has been repeatedly overruled by this Court. Granviel v. State, 552 S.W.2d 107 (Tex.Cr.App. 1976); Collins v. State, 548 S.W.2d 368 (Tex.Cr.App. 1976); Jurek v. State, 522 S.W.2d 934 (Tex.Cr.App. 1975), aff'd 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

At the punishment stage of the trial, witnesses from various cities in New Mexico, Kansas, Oklahoma, Louisiana, and Texas testified that appellant's reputation in their communities for being a peaceful and law-abiding citizen was bad. Evidence was also admitted of appellant's prior conviction in Louisiana for possession and distribution of marihuana, possession of amphetamine, and carrying a concealed weapon, and in a federal district court in Oklahoma for unlawful possession of a sawed-off shotgun. This evidence, together with the evidence adduced at the guilt-innocence stage of the trial, is more than adequate to support the jury's affirmative answers to the punishment issues.

Although appellant's counsel and the State have both filed briefs which are of excellent quality and which greatly aided the Court in its difficult decision, the appellant has filed a pro se brief in which he asserts additional grounds of error. In addition to the grounds of error urged by counsel appellant asserts that the trial court erred in refusing to grant his motion for an instructed verdict and in refusing to sequester the jury during the trial. The evidence that we have already summarized in this opinion is amply sufficient to support the jury's verdict and the court did not err in overruling appellant's motion for an instructed verdict. The careful trial judge considered the appellant's motion concerning the sequestering of the jury during the trial and overruled that motion. Whether to grant this motion is within the discretion of the trial court, and we find nothing to show an abuse of discretion by the trial judge in overruling that motion. The grounds of error presented by the pro se brief are overruled.

The judgment is affirmed.

DALLY, Judge

(Delivered March 12, 1980)

EX BANC

Roberts, J., concurs in result.

THOMAS A. BAREFOOT, Appellant
aka DARREN CALLIER

NO. 63,715 v. - - - Appeal from BELL County

THE STATE OF TEXAS, Appellee

OPINION DISSENTING IN PART

To the overruling of the twelve grounds of error concerning admission of evidence showing commission of extraneous offenses in New Mexico, I respectfully dissent. The Court appears to recognize other proof made by the State and to acknowledge that it showed appellant killed Levin from a more immediate, localized motivation. Given the obvious prejudicial impact of the extraneous New Mexico offenses, I cannot agree that we may tolerate it on the double negative theory that existence of other motives for killing Levin "does not mean that he was not motivated by a desire to avoid his return to New Mexico." It seems clear to me that this is the classic case where slight probative value is far outweighed by heavy prejudice.

CLINTON, Judge

(Delivered March 12, 1980)

EN BANC

Phillips, J. joins

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1127

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
Petitioner,

v.

ERNEST BENJAMIN SMITH,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE AMERICAN PSYCHIATRIC ASSOCIATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1127

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
Petitioner,

v.

ERNEST BENJAMIN SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR THE AMERICAN PSYCHIATRIC ASSOCIATION

Counsel for the American Psychiatric Association hereby respectfully move pursuant to Rule 42 of the Rules of this Court for leave to file the attached brief amicus curiae. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner has been requested, but no response has been received.

The American Psychiatric Association, which is the nation's largest organization of physicians specializing in

v. *J.R.*, 442 U.S. 584 (1979), and *Addington* v. *Texas*, 441 U.S. 418 (1979).

The Association has monitored the administration of capital punishment statutes in this country and the role of psychiatric testimony in that process. The instant case raises important questions about how that role will be implemented. In particular, Texas requires a jury finding that a defendant, if not executed, would "commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code. Crim. Pro. Ann. art. 37.071(b)(2) (Vernon Supp. 1979). In the present case, as has generally been the practice in Texas, testimony on this issue was provided by a psychiatrist, even though, in amicus' view, psychiatrists have no special expertise in this area. Moreover, the basis for the psychiatrist's opinion about the defendant was formed at a pretrial examination purportedly concerned with competency to stand trial, and in circumstances where the defendant was not advised that the psychiatrist might subsequently testify against him at the punishment phase of his trial.

Amicus believes that these practices deviate markedly from the constitutional guidelines established by this Court for the administration of capital punishment. Texas has created a system whereby a psychiatrist, seemingly clothed with professional expertise, acts as little more than an arm of the prosecution, providing damaging testimony secured from an unsuspecting and uncounseled defendant. The decision whether this Court will countenance such practices will have important implications not only for the fair administration of capital punishment statutes, but also for the quality and integrity of the practice of forensic psychiatry. Accordingly, resolution of this case will significantly affect the interests of the Association and its members.

STATEMENT OF THE CASE

Respondent Ernest Smith was indicted for murder for participating in a robbery during which the victim was fatally shot by Smith's accomplice. The State announced its intention to seek the death penalty, and the trial court ordered the prosecutor to secure a psychiatric examination to determine Smith's competence to stand trial. Smith's attorney never raised the question of competence and was not apprised of the court-ordered examination at the time it was performed. The examining psychiatrist, Dr. James Grigson, examined Smith for 90 minutes, concluded that he was competent to stand trial, and so advised the court by written letter. Smith was then tried by a jury and convicted of murder.

In Texas, capital cases require bifurcated proceedings: a guilt phase and a penalty phase. Tex. Code Crim. Pro. Ann. art. 37.071 (Vernon Supp. 1979). At the penalty stage, one of the three critical questions to be resolved by the jury is "[w]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* at art. 37.071(b)(2).[1] At the penalty phase of Smith's trial, the prosecution initially introduced no new evidence on this issue, but, rather, rested its case subject to a right

[1] The other two questions, not at issue in this case, are:

> Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> [and]
>
> [I]f raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. Tex. Code Crim. Pro. Ann. art. 37.071(b)(1), (b)(3) (Vernon Supp. 1979).

to "reopen." Smith's counsel introduced testimony from several lay witnesses about his good character and reputation. The prosecution then sought to call Dr. Grigson, even though neither Smith nor his attorney had been informed at the time of Dr. Grigson's pretrial examination, or at any time prior to his testimony, that the doctor might testify on this issue.[2]

Based solely on the information derived from his 90 minute competency examination of Smith, Dr. Grigson testified that in his view Smith was a "sociopath" because he had failed to display any remorse over the homicide. According to Dr. Grigson, sociopaths repeatedly engage in violent behavior and are not amenable to treatment. On this basis Dr. Grigson concluded that Smith "certainly" would continue to commit acts of violence and, therefore, would constitute a continuing threat to society. The prosecution called no other witnesses at the penalty phase of the trial.

The jury returned a verdict mandating capital punishment. The Texas Court of Criminal Appeals affirmed, 540 S.W.2d 693 (1976), and this Court denied certiorari, 430 U.S. 922 (1977). Smith next unsuccessfully sought habeas corpus in the Texas courts, and then filed a writ of habeas corpus in the United States District Court for the Northern District of Texas. On December 30, 1977, that court (Porter, J.), granted the writ insofar as it vacated Smith's death sentence. 445 F.Supp. 647. The decision rested on the constitutional infirmities surrounding the use of Dr. Grigson's testimony at the penalty phase of Smith's trial, including the failure to advise the defendant and his counsel that information learned at

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[2] Dr. Grigson was not listed on the prosecutor's witness list even though the prosecutor intended to call him during the penalty phase. *Smith* v. *Estelle*, 602 F.2d 694, 702 (5th Cir. 1979).

the time of the competency examination might be used as a basis for testimony against Smith at the death penalty hearing. The court further ruled that the failure to advise the defense that Dr. Grigson would testify at the penalty phase until the doctor actually took the stand violated Smith's right to due process of law, his right to the effective assistance of counsel, and his Eighth Amendment right to introduce complete evidence on the question of mitigating circumstances. The State thereupon filed a motion for a new trial, which was denied.

Texas next appealed to the United States Court of Appeals for the Fifth Circuit. On September 13, 1979, that court affirmed the judgment of the district court. It first held, relying on *Gardner* v. *Florida*, 430 U.S. 349 (1977), that the failure to advise the defense that Dr. Grigson would testify at the penalty phase until the doctor actually took the stand violated Smith's rights under the Fifth and Eighth Amendments. 602 F.2d 694, 698-703. In addition, the court went on to hold that a defendant cannot be compelled to speak to a psychiatrist who can use his statements against him at the sentencing phase of a capital trial, that he must be so advised by the examining psychiatrist, and that he has a right to the assistance of counsel in deciding whether to submit to the examination. *Id.* at 703-709.

This Court granted certiorari on March 17, 1980. 48 U.S.L.W. 3602.

SUMMARY OF ARGUMENT

I. Although the use of expert testimony in state criminal prosecutions is traditionally a matter of state law, the need for reliability in the determination that death is the appropriate punishment for a capital offense warrants exclusion of psychiatric predictions of long-term future criminal behavior as a matter of federal consti-

tutional law. *Gardner* v. *Florida*, 430 U.S. 349 (1977); *Woodson* v. *North Carolina*, 428 U.S. 280 (1976). The professional literature uniformly establishes that such predictions are fundamentally of very low reliability, and that psychiatric testimony and expertise are irrelevant to such predictions. In view of these findings, psychiatric testimony on the issue of future criminal behavior only distorts the factfinding process. To the extent that there are important facts for a jury to consider on this issue, they can be fully presented by lay witnesses who do not testify with the mantle of professional expertise.

II. If, contrary to the argument above, psychiatric testimony may be used in a capital case on the issue of long-term future criminal behavior, the defendant must be provided a full and fair opportunity to challenge and rebut such testimony. This Court's decision in *Gardner* v. *Florida*, 430 U.S. 349 (1977), establishes that a defendant is entitled to a meaningful opportunity to deny or explain information relied upon in the decision to impose the sentence of death. Only when defense counsel is advised that psychiatric testimony will be offered can he adequately prepare cross-examination and rebuttal. The State has no justification for the failure to provide adequate notice.

III. A defendant in a capital case should be allowed to refuse to participate in a psychiatric examination that may lead to testimony against him on the issue of future criminal behavior and should be advised of the purpose of the examination so that he may intelligently exercise this right. The complex of values underlying the Fifth Amendment privilege warrants its application to the penalty phase of a capital case. *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52 (1964); *Presnell* v. *Georgia*, 439 U.S. 14 (1978). A psychiatric examination that looks toward securing testimony concerning long-term future criminal behavior invariably requires the defendant to impart testimonial information. The circumstances surrounding such psychiatric interviews,

moreover, necessitate warnings to protect a defendant against unknowing waiver of the constitutional privilege. Recognition of the privilege in this context will not distort the fair state-individual balance that underlies the privilege.

ARGUMENT

This Court has recognized that "death is a different kind of punishment . . . ." *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977). Before it may be imposed, a state must assure scrupulously fair procedures aimed at protecting the "interest in reliability" obviously so important in a capital case. *Id.* at 359. Amicus believes that such reliability is undermined by the use of psychiatric testimony on the issue of likely long-term future criminal behavior. Although this Court previously ruled that the question of future criminal behavior is a legitimate inquiry in a capital case, *see Jurek* v. *Texas*, 428 U.S. 262, 275-76 (1976), it did not then focus on the use of psychiatric testimony in relation to this inquiry.[8] The fundamental

[8] The Court did note in passing that in the one capital case that had then been considered by the Texas Court of Criminal Appeals, which happened to be defendant Smith's appeal, a psychiatrist had testified. 428 U.S. at 273. This factor was noted at the end of a long list of considerations relating to the issue of future criminal behavior. Since the decision in *Jurek*, however, it has become plain that Texas relies almost exclusively on psychiatric testimony to establish its proof on the issue of future criminal behavior. *See, e.g., Gholson* v. *State*, 542 S.W.2d 395, 400-01 (Tex. Crim. App. 1976), *cert. denied*, 432 U.S. 911 (1977); *Livingston* v. *State*, 542 S.W.2d 655, 661-62 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977); *Moore* v. *State*, 542 S.W.2d 664, 675-76 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 949 (1977); *Collins* v. *State*, 548 S.W.2d 368, 377 (Tex. Crim. App. 1976), *cert. denied*, 430 U.S. 959 (1977); *Battie* v. *State*, 551 S.W.2d 401, 406-07 (Tex. Crim. App. 1977), *cert. denied*, 434 U.S. 1041 (1978); *Granviel* v. *State*, 552 S.W.2d 107, 114-16 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977); *Shippy*

disadvantage of utilizing such testimony is that it gives the appearance of being based on expert medical judgment, when in fact no such expertise exists. While traditionally such matters might be appropriate for elucidation on cross-examination, amicus believes that, in the unique circumstances of a capital case, this Court should prohibit the use of such testimony altogether, and thereby bar false claims to expertise that inevitably distort the jury's factfinding process.

Alternatively, even if this Court is unwilling to prohibit the use of psychiatric testimony on this issue, it should establish procedures that assure basic fairness in the utilization of such testimony. At a minimum, constitutionally satisfactory procedures would require that a defendant and his counsel be fully informed when the state plans to rely on such evidence so that the defendant may develop the requisite information to conduct a fair cross-examination and may be prepared to call rebuttal witnesses if he so chooses. In addition, a defendant should be advised prior to a psychiatric examination that it may subsequently be used to form the basis of expert testimony on the issue of future criminal behavior and that he need not participate in such an examination if he so chooses.[4]

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v. *State*, 556 S.W.2d 246, 254-55 (Tex. Crim. App.), *cert. denied*, 434 U.S. 935 (1977); *Chambers* v. *State*, 568 S.W.2d 313, 324-25 (Tex. Crim. App. 1978); *Von Byrd* v. *State*, 569 S.W.2d 883, 895-96 (Tex. Crim. App. 1978). Indeed, in most of these cases it has been Dr. Grigson, the physician who testified in this case, who appeared as the State's star witness.

[4] The Court of Appeals held that the defendant has a right to be assisted by counsel in making this decision. 602 F.2d at 708-709. Amicus will not address this issue other than to note our agreement that the assistance of counsel should be available at this critical stage of a criminal proceeding, *see Brewer* v. *Williams*, 430 U.S. 387, 398 (1977), and that such assistance would prove extremely helpful to defendants confronting this important but difficult decision.

I. THE USE OF PSYCHIATRIC TESTIMONY IN A CAPITAL CASE ON THE ISSUE OF WHETHER A DEFENDANT IS LIKELY TO COMMIT SERIOUS CRIMES IN THE FUTURE IS CONSTITUTIONALLY INVALID BECAUSE IT UNDERMINES THE RELIABILITY OF THE FACTFINDING PROCESS.

It is well recognized that the use of expert testimony in state prosecutions is traditionally a matter of state evidentiary law. *See* J. Wigmore, Treatise On Anglo-American System Of Evidence In Trials At Common Law § 6a (3d ed. 1940). Nevertheless, this Court has made clear that capital punishment cases are constitutionally "different," *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977) (plurality opinion), and that it is of "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.* at 358. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). In amicus' view the use of expert testimony on the issue of long-term future criminal behavior is inconsistent with these established principles.[4]

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[4] It should be made clear at the outset that amicus is urging a limited prohibition aimed only at *long-term* predictions of violence by psychiatrists. In Texas, the inquiry focuses on the defendant's lifetime, not on a discrete time period where psychiatric expertise might be more relevant. In civil commitment cases, for example, as this Court recognized last Term in *Addington* v. *Texas*, 441 U.S. 418 (1979), psychiatrists often can and do make reliable predictions about short-term prognoses, and such predictions often include potential violence. *See* Monaghan, *Prediction Research and the Emergency Commitment of Dangerous Mentally Ill Persons: A Re-*

As the court below recognized, "Dr. Grigson's testimony was extremely damaging to the defendant." 602 F.2d at 697. After detailing "his extensive [professional] qualifications," *id.*, Dr. Grigson proceeded to testify as a medical expert, using psychiatric nomenclature to describe Smith, and concluding that "certainly Mr. Smith is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so." *Id.* at 698. Faced with this seemingly expert medical testimony, it is not surprising that the jury found that Smith was likely to commit serious criminal acts in the future even though he had no prior record of violent behavior. As this Court has observed, "since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given." *Gregg* v. *Georgia*, 428 U.S. 153, 192 (1976) (plurality opinion).

Increasingly, psychiatrists have been asked, both in civil and criminal proceedings, to make a variety of long and short term assessments of a person's propensity to commit violent acts in the future. As a result, amicus has for many years been concerned with the question of psychiatric predictions of future violent behavior. In the early 1970's the American Psychiatric Association ap-

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consideration, 135 Amer. J. Psychiatry 198 (1978). In such situations the psychiatrist is able to evaluate the patient's current mental condition and to discern likely behavioral patterns, including potential violent behavior in the near future, if the illness remains untreated.

Similarly, amicus is not contending that psychiatrists should be prohibited from testifying on *all* issues at the penalty phase of a capital case. On the contrary, there are many issues, such as the defendant's mental state at the time of the crime or whether he acted under duress, that are well within the expertise of psychiatrists.

pointed a Task Force comprised of distinguished psychiatric experts with experience in the field of criminal behavior "to assemble the body of knowledge concerning the individual violent patient and the clinical issues surrounding his case." American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual, *Clinical Aspects of the Violent Individual* at v (1974) (hereinafter "Task Force Report"). That Task Force submitted a report, "aimed at the practicing clinician," to "describe the current state of the art and [to] provide[] an overview of selected literature and clinical opinion on matters of evaluation, management, and prediction of violent behavior." *Id.* The Task Force focused its analysis on the violent patient—that is, the individual "who acts or has acted in such a way as to produce physical harm or destruction." *Id.* at 1.

The primary conclusion of this Task Force was that judgments as to the long-run potential for future violence and the "dangerousness" of a given individual are "fundamentally of very low reliability," primarily because such judgments are predictions of rare or infrequent events. *Id.* at 23. In some circumstances, of course, a clinician might be fairly confident that violent behavior would recur, as for example where a parent's past behavior clearly and repetitively evidences physical abuse of his or her children. But, as the Task Force noted, the relatively high degree of reliability in these cases is a function of knowing that the base rate of such behavior—that is, the rate of repetitive past violent acts —is very high for the person under scrutiny.[8] *Id.* "It

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[8] In this case, Smith had no history of committing harmful acts; his only prior conviction was for possession of marijuana. *See* Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, 5 Am. J. Crim.

would not be necessary that the patient be 'mentally ill' or suffering from a psychiatric disorder in order to predict that such behavior will recur." *Id.* Thus, to the extent that a psychiatrist's prediction of "dangerousness" is based solely on this knowledge of base rates of behavior, his prediction involves no more "expertise"—and certainly no more "psychiatric expertise"—than does that of the average nonexpert.[7]

According to the Task Force, "the state of the art regarding predictions of violence is very unsatisfactory. The ability of psychiatrists or any other professionals to reliably predict future violence is unproved." *Id.* at 30. " '[D]angerousness' is neither a psychiatric nor a medical

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Law 151, 154 (1977). In view of this fact, it is apparent that Dr. Grigson's testimony that Smith would commit future harmful acts had no scientific basis whatsoever.

[7] One commentator has noted:

> "In an experimental study . . ., college students and psychiatrists agreed extensively on the degree of 'dangerousness' and 'nondangerousness' as indicated by various personality characteristics. Th[illegible]ggests the possibility that psychiatric judgment is not based upon any special knowledge or expertise beyond that of educated laymen. There are also several studies indicating that the diagnostic classifications made by psychologists are not more reliable or valid than those made by laymen."

R. Kirkland Schwitzgebel, "Prediction of Dangerousness and Its Implications For Treatment," *in* W.J. Curran, A.L. McGarry & C.S. Petty, Modern Legal Medicine, Psychiatry, and Forensic Medicine 786 (1980) (footnotes omitted). *See* A. Stone, Mental Health and Law: A System In Transition 33 (1975) ("There are . . . a group of patients in which anyone could predict dangerous acts; *e.g.*, drug addicts who regularly support their habit by mugging, but that prediction does not require a mental health professional.").

diagnosis, but involves issues of legal judgment and definition, as well as issues of social policy. Psychiatric expertise in the prediction of 'dangerousness' is not established and clinicians should avoid 'conclusory' judgments in this regard." *Id.* at 33.[8]

The professional literature on the issue of predictions of future criminal behavior was also reviewed and analyzed in a monograph published by the Center for Studies of Crime and Delinquency of the National Institute of Mental Health. A. Stone, Mental Health And Law: A System In Transition 27-36 (1975). That study similarly demonstrated that there are no reliable criteria for psychiatric predictions of long-term future criminal behavior. *Id.* at 29, *citing* S. Halleck, Psychiatry And The Dilemmas Of Crime 348 (1971); Stürup, "Will This Man Be Dangerous?," *in* De Reueck & Porter, The Mentally Abnormal Offender 17 (1968); Kozol, *et al.*, *The Diagnosis And Treatment of Dangerousness*, 18 Crime and Delinquency 371, 383 (1972). These conclusions are equally true today. Indeed, it has recently been noted that "the professional literature almost uniformly affirms low predictive accuracy with regard to the dangerousness of mental patients." R. Kirkland Schwitzgebel, "Prediction of Dangerousness and Its Implications for Treatment,"

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[8] A second important observation of the Task Force was that "psychiatrists, in order to be safe, too often predict dangerousness, especially in the case of the mentally ill offenders." Task Force Report at 25. *See* "Prediction of Dangerousness and Its Implications for Treatment," *supra* note 7, at 788 ("Mental health personnel rather consistently overpredict dangerousness.") This tendency toward false positive errors in prediction—that is, persons clinically predicted to be dangerous who are in fact not dangerous—has been attributed, at least in part, to "the strong negative reaction of the public to errors associated with the release of dangerous persons, whereas there is relatively little concern about unnecessary confinement." *Id.*

in W.J. Curran, A.L. McGarry, and C.S. Petty, Modern Legal Medicine, Psychiatry, and Forensic Medicine 784 (1980)."

In view of these findings, the use of psychiatric testimony on the issue of long-term future criminal behavior can only distort the factfinding process in a capital punishment trial. To the extent that there are important facts for a jury to consider on this issue—such as a defendant's history of violence—those facts, as in most criminal cases, can be fully presented by lay witnesses who do not testify with the mantle of professional expertise. Indeed this Court recognized as much in *Jurek*, where it upheld the use of the Texas criteria at issue here:

> "[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory ques-

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" *See also* Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. Pa. L. Rev. 439 (1974); Ennis & Litwack, *Psychiatry and The Presumption of Expertise: Flipping Coins In The Courtroom*, 62 Calif. L. Rev. 693 (1974); Livermore, Malmquist & Meehl, *On The Justifications for Civil Commitment*, 117 U. Pa. L. Rev. 17 (1968); Steadman & Cocozza, *Psychiatry, Dangerousness, and The Repetitively Violent Offender*, 69 J. Crim. Law & Criminology, 226, 229-231 (1978); Wenk, Robinson & Smith, *Can Violence Be Predicted?* 18 Crime and Delinquency 393 (1972). *See also United States ex rel. Mathew* v. *Nelson*, 461 F.Supp. 707, 710 (N.D. Ill. 1978).

> tion in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice." *Jurek* v. *Texas*, 428 U.S. 262, 275-276 (1976).

A prohibition against using expert testimony, then, will deny the jury no "possible relevant information about the individual defendant whose fate it must determine . . . ." *Id.* at 276. On the contrary, by sifting the mystique from the facts and leaving only the latter, it will help assure that a sentence of death is not the product of "wholly arbitrary and capricious action." *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976). The integrity of the criminal process demanded in a capital case will allow for no less.

II. ASSUMING ARGUENDO THAT PSYCHIATRIC TESTIMONY MAY BE USED IN A CAPITAL CASE ON THE ISSUE OF FUTURE CRIMINAL BEHAVIOR, THE DEFENDANT MUST BE PROVIDED A FULL AND FAIR OPPORTUNITY TO CHALLENGE AND REBUT SUCH TESTIMONY.

In *Gardner* v. *Florida*, 430 U.S. 349 (1977), this Court held that the Constitution is violated when a defendant is sentenced to death on the basis of information that he had no opportunity to explain or deny. 430 U.S. at 362-364. In that case, the sentencing judge relied on portions of a presentence investigation report that he considered confidential and did not disclose to either counsel for the State or counsel for the defendant.

In striking down that practice, the plurality opinion reviewed each of the justifications asserted by the State for a capital sentencing procedure that would permit a trial judge to impose the death sentence based on undisclosed information. As to the State's asserted need to provide assurances of confidentiality to potential sources of information, the plurality found intolerable the "risk

that some of the information accepted in confidence may be erroneous, or may be misinterpreted." 430 U.S. at 359. The plurality also found insufficient the State's asserted need to eliminate the potential for delay and to avoid disruption of the rehabilitation process. Finally, the plurality characterized as "foreclosed" by *Furman* v. *Georgia*, 408 U.S. 238 (1972), the contention that trial judges could be trusted to exercise their discretion in a responsible manner. In sum, the plurality concluded that the defendant had been deprived of due process of law because he was denied "the opportunity to deny or explain" information that was relied upon in the decision to impose the sentence of death.[10]

The "opportunity to deny or explain" referred to by the plurality in *Gardner* surely refers to the "opportunity to be heard 'at a meaningful time and in a meaningful

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[10] Mr. Justice White concurred in the judgment on the ground that the use of secret information in a capital sentencing procedure failed to meet the requirement under *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976), for "reliability in the determination that death is the appropriate punishment . . . ." 430 U.S. at 364. In view of that conclusion, Mr. Justice White found it unnecessary to address "the possible application to sentencing proceedings—in death or other cases—of the Due Process Clause, other than as the vehicle by which the strictures of the Eighth Amendment are triggered . . . ." *Id.* Mr. Justice Brennan, though adhering to the views he had expressed in *Gregg* v. *Georgia*, 428 U.S. 153, 227 (1976), stated that he agreed that the Due Process Clause of the Fourteenth Amendment is violated when a defendant facing the death sentence is not informed of the contents of a presentence report made to the sentencing judge. 430 U.S. at 364. Decisions of this Court subsequent to *Gardner* establish that the Due Process Clause is applicable to capital sentencing procedures. *Green* v. *Georgia*, 424 U.S. 95 (1979) (per curiam); *Presnell* v. *Georgia*, 439 U.S. 14 (1978) (per curiam).

manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976), *quoting Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). The circumstances surrounding the presentation of Dr. Grigson's testimony in this case highlight the need for defense counsel to have a *meaningful* opportunity to comment on psychiatric testimony concerning future criminal behavior. As discussed above, the scientific literature seriously undermines the validity of the kind of professional judgments advanced by Dr. Grigson, *See* pp. 13-16, *supra*. Obviously, familiarity with this body of information will not be commonplace among lawyers charged with representing defendants in capital cases. Only when counsel is properly advised that such testimony will be offered can he adequately prepare cross-examination and rebuttal.

In this case, defense counsel was totally denied this important opportunity. First, counsel was not notified in advance that the state trial court had ordered a psychiatric examination of the defendant to determine competency to stand trial. Dr. Grigson filed no formal report after his interview with the defendant, but instead wrote a letter to the state trial judge stating his conclusion that the defendant was competent. A copy of this letter was never sent to defense counsel. By happenstance, defense counsel did see the letter while inspecting the court's files, but they testified that this did not lead them to conclude that Dr. Grigson would testify as to "dangerousness" since his letter went to the issue of competency to stand trial.

Next, the trial court entered an order requiring counsel for the prosecution to list all the State's witnesses whom he in good faith expected to use at the trial of the State's case in chief, both during the guilt or innocence stage and, if known, the punishment stage. This order notwithstanding, the prosecution never notified defense counsel that Dr. Grigson would (or even might) be

called on the issue of dangerousness. Moreover, the trial court subsequently entered an order precluding the prosecution from calling in its case-in-chief any witnesses not named on the witness list. Thus, defense counsel could legitimately claim surprise when the prosecution "reopened" its case after presentation of defense witnesses at the punishment stage to introduce the testimony of Dr. Grigson.

As the court below stated, "[s]urprise can be as effective as secrecy in preventing effective cross-examination . . . ." 602 F.2d at 699. That is plainly so here. If defense counsel had been provided adequate time to prepare, he could obviously have raised serious questions about Dr. Grigson's testimony. *See* Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, And Professional Ethics*, 5 Am. J. Crim. Law 151 (1977).[11]

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[11] In fact, these questions could have covered other issues in addition to the inaccuracy of psychiatric prediction of long-term future criminal behavior. Dr. Grigson testified that Smith was a "sociopath," and he based this conclusion to a considerable extent on his observation that Smith evidenced no "remorse." But the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders was revised in 1968 to eliminate the term "sociopathy" and to reclassify a roughly equivalent category of disorder entitled "antisocial personality disorder." *See* DSM II, ¶ 301.7 (1968). More significantly, the discussion of the "antisocial personality disorder" in the most recent version of that manual evidences the need for an examination of a broad range of the patient's behavior in connection with a diagnosis of that disorder. DSM III, ¶ 301.70 (1980). *See generally*, S. Dinitz, "The Antisocial Personality," *in* W.J. Curran, A.L. McGarry, & C.S. Petty, Modern Legal Medicine, Psychiatry, and Forensic Science 799 (1980); R.A. Woodruff, D.W. Goodwin, & S.B. Guze, Psychiatric Diagnosis 143 (1974); G.E. Vaillant, *Sociopathy As A Human Process*, 32 Arch. Gen. Psychiatry 178 (1975). This broad behavioral approach undermines

any suggestion that the disorder is established solely or even primarily by the absence of indications of "remorse" as Dr. Grigson suggested.

Moreover, although Dr. Grigson's brief 90 minute mental status examination of Smith may well have been sufficient for a psychiatric determination as to competency, it was wholly inadequate in terms of the detail that should have been pursued to diagnose an antisocial personality disorder or to make a prediction concerning long-term future behavior. A mental status examination focuses on the individual's current perceptions and orientation. By itself, it provides no medical basis for making long-term future behavioral predictions of any type, let alone those aimed at future criminal behavior. *See* Sands, "Psychiatric History And Mental Status," in A Freedman & H. Kaplan, eds., Comprehensive Textbook of Psychiatry 499 (1977).

Dr. Grigson also testified that no psychiatric treament could change Smith's behavior and that Smith would not improve but would only continue the same way or get worse. But an extensive review of the professional literature in 1972 prompted two commentators to note that, although the results had to be interpreted with some caution, the data indicate that "some techniques may be effective in the treatment of antisocial personality in juvenile offenders and possibly in some adults." Levine & Bornstein, *Is The Sociopath Treatable? The Contribution of Psychiatry To A Legal Dilemma*, 1972 Wash. Univ. L.Q. 693, 711. *See* F.L. Carney, "Inpatient Treatment Programs," *in* W.H. Reid, The Psychopath: A Comprehensive Study Of Antisocial Disorders And Behaviors 261 (1978); Rappeport, *Enforced Treatment—Is It Treatment?*, II Bull. Am. Acad. Psychiatry & Law 48 (1974). Moreover, there is evidence indicating that even if treatment is not possible, the mere passage of time may effect improvement. R.A. Woodruff, D.W. Goodwin, & S.B. Guze, Psychiatric Diagnosis 149 (1974); Cocozza & Steadman, *Some Refinements In The Measurement and Prediction of Dangerous Behavior*, 131 Am. J. Psychiatry 1012 (1974); M. Craft, *The Natural History of Psychopathic Disorder*, 115 Brit. J. Psychiatry 39, 43 (1969). Indeed, the most recent edition of the Association's Diagnostic And Statistical Manual notes that "[a]fter age 30 the more flag-

Counsel could have prepared an effective cross-examination and, indeed, could perhaps have secured convincing rebuttal witnesses. In this manner, the jury could at least have received a more complete presentation of the relevant considerations.

In capital cases, as this Court has made clear, a jury requires both "standards to guide its use of the information [presented]," *Gregg* v. *Georgia*, 428 U.S. 153, 195 (1976), and the participation of counsel in "comment[ing] on facts which may influence the sentencing decision," *Gardner* v. *Florida*, 430 U.S. 349, 360 (1977). Here, by contrast, the procedures used by the State deprived the jury of an opportunity to hear defense counsel challenge the accuracy or materiality of the information.[12]

Texas asserts no justification—and amicus can conceive of none—for the failure to give defense counsel adequate notice that expert psychiatric testimony would be admitted on the issue of dangerousness. Instead, Texas argues that since Dr. Grigson's testimony was disclosed on the record, this case is governed not by *Gard-*

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rant aspects may diminish, particularly sexual promiscuity, fighting, criminality, and vagrancy." DSM III, ¶ 301.70 (1980).

[12] It is worth noting in this regard that the statute upheld in *Gregg* v. *Georgia* provided that at the penalty stage of the criminal proceeding "only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible." 428 U.S. at 164, *quoting* Ga. Code Ann. § 27-2503 (Supp. 1975). Moreover, this Court noted in *Gregg* that "the importance of obtaining accurate sentencing information" was underscored by the requirement in Rule 32(c) of the Federal Rules of Criminal Procedure that counsel be afforded an opportunity to comment on the presentence report and to introduce information relating to any alleged factual inaccuracy in the report. 428 U.S. at 189 n.37.

ner v. *Florida, supra,* but by *Williams* v. *New York,* 337 U.S. 241 (1949).[13] The argument is flawed. In its zeal to distinguish *Gardner,* Texas apparently overlooks the fact that the plurality opinion in *Gardner* specifically noted that *Williams* was decided some 30 years ago, and that in the interim this Court had "acknowledged its obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society." 430 U.S. at 357. In the course of that re-examination, five members of the Court had by 1977 concluded that death is a different kind of punishment from any other that may be imposed in this country. And it is now beyond question that "this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett* v. *Ohio,* 438 U.S. 586, 604 (1978) (Burger, C.J.). The state's continued reliance upon *Williams* v. *New York, supra,* is therefore plainly misplaced.

Federal constitutional guarantees surrounding imposition of the unique and irrevocable punishment of death necessitate procedures that meet the need for reliability in the determination that death is the appropriate sentence. That need for reliability is not satisfied when defense counsel is given only a technical opportunity to comment on critical psychiatric testimony and no advance notice sufficient to allow meaningful preparation for cross-examination and rebuttal. The thrust of this Court's ruling in *Gardner* is that the interest in reli-

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[13] The state also argues that the defendant waived any error of constitutional dimension. The Court of Appeals correctly concluded that there was no effective waiver of the constitutional error. 602 F.2d at 701 n.8, 708 n.19; *see Gardner* v. *Florida, supra,* 430 U.S. at 361-62 (no waiver where defense counsel failed to request access to entire presentence report).

ability demands "an opportunity to comment on facts which may influence the sentencing decision in capital cases." 430 U.S. at 360. A meaningless "opportunity" to comment fails to further the interest in reliability, and thus fails to withstand constitutional scrutiny.

III. A DEFENDANT IN A CAPITAL CASE SHOULD BE ALLOWED TO REFUSE TO PARTICIPATE IN A PSYCHIATRIC EXAMINATION THAT MAY LEAD TO TESTIMONY AGAINST HIM ON THE ISSUE OF FUTURE CRIMINAL BEHAVIOR AND SHOULD BE ADVISED OF THE PURPOSE OF THE EXAMINATION SO THAT HE MAY INTELLIGENTLY EXERCISE THIS RIGHT.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. 5. "By its very nature, [this] privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." *Couch* v. *United States*, 409 U.S. 322, 327 (1973); *see United States* v. *Nobles*, 422 U.S. 225, 233 (1975). That privilege is violated when, as here, a defendant is required without warning to participate in a psychiatric examination that probes this "private inner sanctum of individual feeling and thought," and the results of that examination are then admitted against him in a capital sentencing proceeding.[14]

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[14] The state suggests that the Fifth Amendment privilege is inapplicable to the sentencing phase of the trial because "incrimination is complete once guilt has been adjudicated." Brief for Petitioner, at 33 & n.20, *quoting* Webster's New International Dictionary of the English Language and Black's Law Dictionary. The state is simply wrong. The Fifth Amendment speaks not in terms of "incrimination" but in terms of compulsion to be a witness against oneself in a criminal proceeding. The capital sentencing procedure is a

The complex of values behind the Fifth Amendment privilege warrants application of these principles in the capital sentencing context. *See Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52, 55-57 & n.5 (1964). This Court has observed that "[a]ll these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966) (citations omitted). These policies are critically implicated when the state seeks to punish the defendant with death. Indeed, "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases." *Lockett* v. *Ohio*, 438 U.S. 556, 605 (1978) (Burger, C.J.).

Amicus submits that the policies underlying the Fifth Amendment privilege—heightened as they are in the capital sentencing context—dictate that a defendant be allowed to refuse to participate in a court-ordered psychi-

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critical part of a criminal proceeding. Nor is it necessary in this case to address the issue of the application of the privilege to all sentencing, since this case involves only capital sentencing. And as this Court recently noted, certain "fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." *Presnell* v. *Georgia*, 439 U.S. 14, 16 (1978) (per curiam).

atric examination that may result in evidence that can be used against him at the sentencing stage of the proceeding. As the court below properly concluded, a psychiatric examination that looks to long-term dangerousness invariably requires the defendant to impart "testimonial" information. Since the key fact in such an inquiry will be the defendant's history of violence, *see* p. 13, *supra*, it is the substance of his communication that is critical. Hence, this case is different from those involving blood tests, *see Schmerber* v. *California*, 384 U.S. 757 (1966), handwriting samples, *see Gilbert* v. *California*, 388 U.S. 263 (1967), or voice exemplars, *see United States* v. *Dionisio*, 410 U.S. 1 (1973), where noncommunicative evidence is compelled. Indeed, absent a defendant's willingness to cooperate as to the verbal *content* of his communications, it is clear that a psychiatric examination in these circumstances would be meaningless. *See generally* Stevenson, "The Psychiatric Interview," *in* American Handbook of Psychiatry 1138-56 (2d ed. 1974); Will, *The Reluctant Patient, the Unwanted Psychotherapist—and Coercion*, 5 Contemp. Psychoanalysis 23 (1969).

It is also significant to realize that the use of psychiatric testimony at the punishment phase of a capital case arises in circumstances that are vastly different from those involved in competency or sanity adjudications, where compelled examinations traditionally have been upheld. *See, e.g., United States* v. *Cohen*, 530 F.2d 43, 47-48 (5th Cir.), *cert. denied*, 429 U.S. 855 (1976); *United States* v. *Albright*, 388 F.2d 719, 724-25 (5th Cir. 1968). In the latter instances, it is typically the defendant who presses the issue either to avoid trial or as an affirmative defense.[15] If the prosecution cannot

[15] Even in jurisdictions where the trial court may raise such matters *sua sponte*, the purpose is to protect the incompetent defendant and to maintain the integrity of the criminal process, not to seek an enhanced penalty or alter-

then secure its own psychiatric examination, the defendant is given an undue advantage. *See United States* v. *Cohen, supra; United States* v. *Albright, supra.* In short, the defendant in these circumstances effectively "waives" his right to object to a compelled examination. *See United States* v. *Malcolm*, 475 F.2d 420, 425 (9th Cir. 1973); *United States* v. *Weiser*, 428 F.2d 932, 936 (2d Cir. 1969), *cert. denied*, 402 U.S. 949 (1971).

When it comes to psychiatric testimony at the penalty phase, by contrast, it is the state that seeks imposition of the death penalty; it, therefore, must go forward to show that the defendant is likely to commit harmful acts in the future. Thus, unlike a plea of incompetence or a defense of insanity, there is no comparable waiver in a capital case unless, as the district court ruled in this case, "the Defendant initiates a psychiatric examination on the issue of dangerousness or if he seeks to introduce psychiatric testimony at the punishment phase . . . ." 445 F.Supp. at 663. In the absence of such a waiver theory, the rationale of cases such as *United States* v. *Cohen, supra*, would be plainly inapposite, and a defendant should not be compelled to participate in a psychiatric examination on issues concerning the penalty phase.[16]

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native means of conviction. *See Whalem* v. *United States*, 346 F.2d 812 (D.C. Cir.), *cert. denied*, 382 U.S. 862 (1965). In any event, this Court need not here decide whether a psychiatric examination can be compelled on sanity or competence when the defendant does not raise those issues.

[16] Nor can a psychiatric examination focused on issues that are dispositive of capital punishment be analogized to a compelled psychiatric examination in a civil commitment case where the purpose of hospitalization, at least in part, is to help the severely ill patient. *See Addington* v. *Texas*, 411 U.S. 418 (1979). In short, as *Addington* recognized, whole-

It should be emphasized that recognition of a right to refuse participation in psychiatric examinations that could lead to testimony for capital sentencing purposes would not distort the "fair state-individual balance" that underlies the Fifth Amendment privilege.[17] *See Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964). To begin with, in determining the likelihood that a defendant would be a continuing threat to society, a sentencing jury is free to—and indeed should—consider a wide range of information, including the range and severity of the defendant's prior criminal conduct, his age at the time of the offense, and whether he acted under duress or other situational pressures. The availability of these other sources of information relevant to the issue of "dangerousness" negates any suggestion that the failure to allow a compelled psychiatric examination will unduly hamper the fair administration of justice. Moreover, in view of the overwhelming evidence indicating that psychiatric predictions of dangerousness are not based on medical expertise, *see* pp. 13-16, *supra*, recognition of the privilege in this context serves to exclude information that is at best of questionable validity and usefulness.

In addition, in circumstances such as those presented here, the defendant should not be required to guess that he may refuse to participate in the psychiatric examination. Rather, a warning as to the right to remain silent

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sale adoption of the adversary process employed in criminal cases is not warranted in the civil commitment context. Rather, a more particularistic due process analysis is required.

[17] Nor would such a right interfere with court-ordered competency or sanity examinations. Rather, when a defendant refuses to participate in an examination that could lead to testimony on the issue of future criminal behavior, the examining psychiatrist can be required to limit his testimony to the issues of competency and sanity.

and as to the fact that anything said can be used against the individual is "the threshold requirement for an intelligent decision as to [the] exercise [of the privilege]," *Rhode Island* v. *Innis*, 48 U.S.L.W. 4506, 4508 (May 12, 1980), *see Maness* v. *Meyers*, 419 U.S. 449, 467 (1975), especially because the defendant may be under the impression that the examination relates only to issues of competency or sanity. Indeed, warnings may well be required to avoid actual deception in this regard. Thus, this case cannot be viewed as a so-called "ordinary case," *Garner* v. *United States*, 424 U.S. 648, 654 (1976), "where the government has no substantial reason to believe that the disclosures are likely to be incriminating," *Roberts* v. *United States*, 48 U.S.L.W. 4370, 4372 (April 15, 1980). On the contrary, the circumstances at issue here involve the in-custody interrogation of a criminal defendant by a *de facto* agent of the State who "has repeatedly testified for the state." *Smith* v. *Estelle*, 602 F.2d at 700 n.7.[18] As the Fifth Circuit noted, Dr. Grigson "has not appeared in the report of any case as a witness for the defense[,] . . . [o]n many occasions . . . has

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[18] Dr. Grigson has testified for the State in at least eleven other death cases decided by the Texas Court of Criminal Appeals. *See Barefoot* v. *State*, 596 S.W.2d 875, 887-88 (Tex. Crim.App. 1980); *Simmons* v. *State*, 594 S.W.2d 760, 765 (Tex.Crim.App. 1980); *Brandon* v. *State*, —— S.W.2d ——, No. 59,348 (Tex.Crim.App. April 25, 1979); *Adams* v. *State*, 577 S.W.2d 717, 731 (Tex.Crim.App. 1979); *Chambers* v. *State*, 568 S.W.2d 313, 324-26 (Tex.Crim.App. 1978), *cert. denied*, 440 U.S. 928 (1979); *Hughes* v. *State*, 562 S.W.2d 857, 863-64 (Tex.Crim.App. 1978); *Robinson* v. *State*, 548 S.W.2d 63, 65 (Tex.Crim.App. 1977); *Collins* v. *State*, 548 S.W.2d 368, 377-78 (Tex.Crim.App. 1976), *cert. denied*, 430 U.S. 959 (1977); *Gholson* v. *State* and *Ross* v. *State*, 542 S.W.2d 395, 400-01 (Tex.Crim.App. 1976), *cert. denied*, 432 U.S. 911 (1977); *Moore* v. *State*, 542 S.W.2d 664, 676 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 949 (1977); *Livingston* v. *State*, 542 S.W.2d 655, 661-62 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 933 (1977).

declared that a person he examined was a sociopath or was otherwise likely to commit crimes in the future[,] . . . [and] [f]requently . . . reached this conclusion after he was assigned to examine only for competence or sanity." [19] *Id.* at 701 n.7. Surely, then, the facts concerning practices in Texas highlight the need for certain limited warnings to safeguard a capital defendant's Fifth and Fourteenth Amendment privilege against compulsory incrimination.[20]

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[19] *See, e.g., Bruce* v. *Estelle*, 536 F.2d 1051, 1054-56 (5th Cir. 1976), *cert. denied*, 429 U.S. 1053 1977; *Livingston* v. *State*, 542 S.W.2d 655, 661 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 933 (1977); *Gholson* v. *State*, 542 S.W.2d 395, 400-01 (Tex.Crim.App. 1976), *cert. denied*, 432 U.S. 911 (1977); *Hurd* v. *State*, 513 S.W.2d 936, 944 (Tex.Crim.App. 1974); *Armstrong* v. *State*, 502 S.W.2d 731, 735 (Tex.Crim. App. 1974).

[20] The ethical principles of the psychiatric profession fully support this position. Section 9 of the American Psychiatric Association's Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry provides:

> "Psychiatrists are often asked to examine individuals for security purposes, to determine suitability for various jobs, and to determine legal competence. The psychiatrist must fully describe the nature and purpose and lack of confidentiality of the examination to the examinee at the beginning of the examination." 130 Am. J. Psychiatry 1058 *et seq.* (1973).

Obviously this principle requires that in a capital case, where the stakes are far greater, the defendant must be informed of "the nature and purpose and lack of confidentiality of the examination." *See also* R. Sadoff, Forensic Psychiatry: A Practical Guide for Lawyers and Psychiatrists 25 (1975) (if the psychiatrist is called in by the government (or prosecution) or by the court as a neutral examiner, he should identify his position and role to the defendant). *See generally* Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, *supra* note 6, at 170-212.

In sum, the Fifth Amendment should fully protect a defendant from participating in a psychiatric examination that could lead to testimony at a penalty phase of a capital case without his knowledge and consent. "[W]e do not make even the most hardened criminal sign his own death warrant, or dig his grave, or pull the lever that springs the trap on which he stands." Griswold, The Fifth Amendment Today 7 (1955). Yet, this is precisely what the State of Texas did to Ernest Benjamin Smith.

CONCLUSION

Amicus curiae, the American Psychiatric Association, respectfully requests that this Court affirm the decision below.

Respectfully submitted,

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NO. 80-5320

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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THOMAS A. BAREFOOT,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner's contention of denial of due process is properly before this Court since it was not raised to either the trial court or the Texas Court of Criminal Appeals.

II. If Petitioner's due process contentions are properly before this Court, was the use of hypothetical questions to expert psychiatric witnesses a denial of due process.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas, Respondent herein, and in response to the Petition for Writ of Certiorari of Thomas A. Barefoot would show the Court the following:

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as Barefoot v. State, 596 S.W.2d 875 (Tex.Crim.App. 1980), and is reproduced as Appendix B to the petition for writ of certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). However, as noted in the reasons for denying the writ, Petitioner has not presented to the Texas courts the issues which he presents herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Const., Amend. VIII.

2. United States Const., Amend. XIV.

STATEMENT OF FACTS

Petitioner was indicted for the August 7, 1978, capital murder of Carl Levin, a peace officer in the lawful discharge of an official duty. The evidence introduced at trial showed that at the time of the murder, Petitioner was a fugitive from justice from the state of New Mexico where he was charged with rape, sexual abuse, and kidnapping of a child. He was also charged with escape in that state. Petitioner had planned a robbery in Harker Heights, Texas, and planned to create a diversion for the police by setting fire or blowing up a building in that community. Petitioner had an associate take him to Harker Heights where the associate left Petitioner armed with a .25 caliber pistol and a gallon of gasoline in a plastic milk jug. (S/F 1524-28).

Officer Carl Levin was called to investigate the fire. Petitioner was seen by witnesses at the fire. Those witnesses informed Officer Levin who drove his car in the direction that Petitioner had been seen heading. Another witness, Mr. Michael Thrash, saw a patrol car stop and an officer get out. He then saw a man wearing bluejeans and a white T-shirt walk out of the bushes and approach the officer. The man who had appeared out of the bushes shot the police officer in the head at point blank range. (S/F 1237-43). Carl Levin died beside his patrol car with his gun still strapped in the holster. (S/F 1253, 1331). The autopsy revealed that the officer died from a bullet fired at close range that entered the left side of his forehead two inches above his left eyebrow and passed through the brain. Petitioner was arrested in Houston, Texas, on August 8, 1978. A fully loaded .25 caliber automatic pistol was found in his right rear pocket. (S/F 1675-80). Ballistic tests revealed

that the bullet that killed Officer Levin and the shell casing found beside his body were fired from the pistol seized from Petitioner at the time of his arrest. (S/F 1781-82).

The jury found Petitioner guilty of the offense of capital murder as charged in the indictment. The jury additionally returned a verdict of yes to all three special issues. The trial court then assessed punishment at death in accordance with the statute.

Petitioner appealed his conviction to the Texas Court of Criminal Appeals. In that appeal, he raised questions as to the qualifications of the experts who testified on hypothetical questions and the nature of the hypothetical questions. Petitioner did not raise an issue of denial of due process or cruel and unusual punishment as to the hypothetical questions or the testimony given in response to those questions.

SUMMARY OF ARGUMENT

Petitioner has argued that certiorari should be granted to consider whether the use of hypothetical questions at his trial violated the Eighth and Fourteenth Amendments to the Constitution of the United States. These issues were presented neither to the trial court nor to the Texas Court of Criminal Appeals. Therefore, certiorari is inappropriate as to these issues. Further, even if these issues were properly before the Court, Petitioner has raised a question only as to the weight of the testimony and not as to its admissibility. Therefore, Petitioner has not raised a federal question.

REASONS FOR DENYING THE WRIT

I.

PETITIONER DID NOT PRESENT TO THE COURT BELOW THE CONTENTIONS WHICH HE RAISES ON CERTIORARI.

Petitioner contends that the use of the hypothetical questions during the punishment stage of his trial violates

the Eighth and Fourteenth Amendments to the Constitution of the United States. He has raised his arguments in this Court in the context of denial of due process and cruel and unusual punishment. This was not the basis raised in the Texas Court of Criminal Appeals. (Appellant's Brief 55-65). Further, the court below did not consider these contentions on the basis of the Fourteenth or Eighth Amendments to the United States Constitution. There was no discussion of a due process violation in the use of this testimony or any discussion that the testimony might constitute cruel and unusual punishment. Therefore, since Petitioner did not present this question for consideration to the court below and it was not considered, it should not be considered on certiorari. Cardinale v. Louisiana, 394 U.S. 437 (1969); Tacon v. Arizona, 410 U.S. 351 (1973).

II.

PETITIONER'S CONTENTIONS AS TO THE RELIABILITY OF EXPERT TESTIMONY BASED ON HYPOTHETICAL QUESTIONS RAISE NO FEDERAL QUESTION.

Petitioner argues that psychiatric prediction of future behavior is so unreliable as to constitute a denial of due process and create a cruel and unusual punishment. In Petitioner's case, both expert witnesses were asked hypothetical questions based upon the facts presented in evidence by the State. Their conclusions were opinions based upon those facts. Neither psychiatrist examined Petitioner or based his finding on any statements made by Petitioner. The expert opinions were subject to cross-examination and impeachment as are any other expert opinions.

This evidence was not the only evidence used during the punishment stage of Petitioner's trial. The jury had before it the evidence that had been presented at the guilt stage of of the trial as to Petitioner's involvement in the crime. The jury also had evidence of Petitioner's bad reputation in several states and his prior offenses. Additionally, the State of Texas proved up Petitioner's extraneous offense for sexual abuse and

kidnapping and rape of a child in New Mexico. Petitioner's argument goes only as to the weight to be given this evidence. He complains that the hypothetical question erroneously assumes as true disputed facts, that it adds no mitigating circumstances, and the like. He sets forth no reasons why the testimony should be inadmissible on federal constitutional grounds. Therefore, Petitioner has not presented a federal question to be considered on certiorari.

CONCLUSION

For all the foregoing reasons, Petitioner prays that certiorari be denied.

Respectfully submitted,

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